

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S
APPENDIX**

76-1513

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

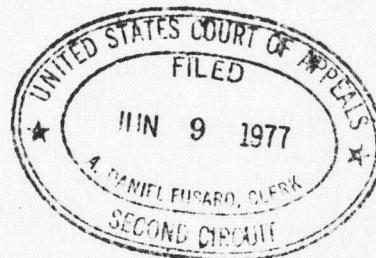
v.

JOSEPH A. LOMBARDO, DONALD A. DICARLO,
RICHARD KELSEY, EDWARD A. OWCZARZAK,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPENDIX



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION :
OF THE UNITED STATES FOR AN ORDER : MIS.C. CRIM. NO. 188
AUTHORIZING THE INTERCEPTION :
OF WIRE COMMUNICATIONS :

O R D E R

AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation,
United States Department of Justice

Application under oath having been made before me by Richard D. Endler, an Attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the Court finds:

(a) there is probable cause to believe that Joseph A. Lombardo, Donald A. DiCarlo, James W. Kelsey, Richard Kelsey, an unidentified male individual known only as "Ozzie", a male individual believed to be Jack M. Silverstein, and others as yet unknown have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business which has been and is being conducted in violation of Article 225.05 of the Penal Laws of the State of New York, and

thereby, within the meaning of and in violation of Title 18, United States Code, Section 1955, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is herewith applied for. In particular, these wire communications will concern discussions of the progress and success of the aforesaid gambling business, dissemination of orders and instructions to subordinates, the receiving of line and other wagering information pertaining to sporting events, the transmittal and acceptance of wagers placed upon the outcome of sporting events, the settling of accounts, other conversations relating to the administration, conduct and management of the aforesaid illegal gambling business, the identity of the participants, the precise nature and scope of the illegal activity, and the relationships of the enterprise with other gambling activities. In addition, the communications are expected to constitute admissible evidence of the commission of the said offenses.

(c) normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried.

(d) there is probable cause to believe that the telephone facility bearing the number 716-633-2254 subscribed to by D. Lanson and billed to

Joseph Lanson and the telephone facility bearing number 716-633-2225 subscribed to by and billed to Joseph Lanson, both of which are located in the premises at Apt. 6, 291 Palmdale Drive, Amherst, New York, have been and are being used by Joseph A. Lombardo, Donald A. DiCarlo, James W. Kelsey, Richard Kelsey, an unidentified male individual known only as "Ozzie", a male individual believed to be Jack M. Silverstein, and others as yet unknown, in connection with the commission of the above-described offenses.

WHEREFORE, it is hereby ordered that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Attorney General of the United States, the Honorable Edward H. Levi, pursuant to the power conferred on him by Section 2516, Title 18, United States Code: to intercept wire communications of Joseph A. Lombardo, Donald A. DiCarlo, James W. Kelsey, Richard Kelsey, an unidentified male individual known only as "Ozzie", a male individual believed to be Jack M. Silverstein, and others as yet unknown concerning the above-described offenses to and from the telephone facility bearing the number 716-633-2254 subscribed to by D. Lanson and billed to Joseph Lanson and the telephone facility bearing number 716-633-2225 subscribed to by and billed to Joseph Lanson, both of which are located in the premises at Apt. 6, 291 Palmdale Drive, Amherst, New York. Such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained but shall continue until communications are intercepted which reveal the manner in which Joseph A. Lombardo, Donald A. DiCarlo, James W. Kelsey, Richard Kelsey, an unidentified male individual known only as "Ozzie",

a male individual believed to be Jack M. Silverstein, and others as yet unknown participate in the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business which has been and is being conducted in violation of Article 225.05 of the Penal Laws of the State of New York, and thereby, within the meaning of and in violation of Title 18, United States Code, Section 1955, and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this order, whichever is earlier.

It is further ordered, upon request of applicant, that the New York Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of twenty (20) days from the date of this order.

PROVIDING FURTHER THAT, particular care will be exercised to avoid the interception of any conversation of persons under criminal indictment which pertains to their culpability in relation to their indictments or the strategy which they contemplate employing in their defense. In this regard it is noted that

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Subject Richard Kelsey is currently under indictment for gambling related violations of the New York State Penal Code.

PROVIDING ALSO, that the applicant shall provide the court with a report on the 5th, 10th and 15th days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

s/s John T. Elfvin
UNITED STATES DISTRICT JUDGE

DATED: 10-31-75
AT: Buffalo, New York

AFFIDAVIT FOR THE OCTOBER 31, 1975 APPLICATION
FOR THE INTERCEPTION OF WIRE
COMMUNICATIONS

A F F I D A V I T

John C. Poerstel, being duly sworn according to law,
deposes and states the following:

(1) Your Affiant has been a Special Agent of the Federal Bureau of Investigation since 1971 and as such is an "investigative and law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18 of the United States Code, that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for the offenses enumerated in Section 2516 of Title 18 of the United States Code; and Your Affiant has been assigned to the Buffalo Office of the Federal Bureau of Investigation since 1972, during which time Your Affiant has conducted or participated in excess of 25 gambling investigations.

(2) This affidavit seeks authorization to intercept wire communications involving violations of Article 225.05 of the Penal Laws of the State of New York, and thereby, violations of Sections 1955 and 371 of Title 18, United States Code, which offenses have been and are being committed by Joseph A. Lombardo (W/M, 9/25/37), 195 Temple Drive, Cheektowaga, New York; Donald A. DiCarlo (W/M, 10/23/32), 1525 Millersport Highway, Amherst, New York; Richard Kelsey (W/M, 9/11/48), 5 Pritchard Street, Buffalo, New York; James W. Kelsey (W/M, 6/5/35), 5 Pritchard Street, Buffalo, New York; an unidentified white male individual known only as "Ozzie"; a male individual believed to be Jack M. Silverstein (W/M, 5/25/36), 1260 North Forest, Williamsville, New York and others as yet unknown.

Your Affiant has supervised the conduct of the investigation of these offenses and as a result of personal participation in this

investigation and of reports made to Your Affiant by other Special Agents of the Federal Bureau of Investigation working with Your Affiant, Your Affiant is familiar with all the facts and circumstances of the said investigation. On the basis of that familiarity Your Affiant has probable cause to believe that the aforesaid six individuals and others as yet unknown, have committed, are committing, and are about to commit violations of Sections 1955 and 371 of Title 18 of the United States Code at the following location and at the following facilities in the Western District of New York:

(a) The telephone facility bearing number 716-633-2225 located in a second floor apartment at 291 Palmdale Drive, Apartment number six, Amherst, New York, which is a two story brick apartment dwelling. The aforesaid telephone facility bears a number billed to and subscribed to by Joseph Lanson, 291 Palmdale Drive, Danny-brook Apartments, Amherst, New York.

(b) The telephone facility bearing number 716-633-2254 located in a second floor apartment at 291 Palmdale Drive, Apartment number six, Amherst, New York, which is a two story brick apartment dwelling. The aforesaid telephone facility bears a number billed to Joseph Lanson and subscribed to by D. Lanson, 291 Palmdale Drive, Danny-brook Apartments, Amherst, New York.

(3) The type of communications sought to be intercepted are: discussions of the progress and success of the aforesaid gambling business, discussions of orders and instructions to subordinates, the receiving of line and other wagering information pertaining to sporting events, the transmittal and acceptance of wagers placed upon the outcome of sporting events, the settling of accounts,

other conversations relating to the administration, conduct and management of the aforesaid illegal gambling business, the identity of the participants, and the precise nature and scope of the illegal activities at telephone facilities 716-633-2254 and 716-633-2225 described in paragraphs 2 (a) and (b) above.

(4) From personal participation in the aforesaid investigation and upon review of reports submitted to Your Affiant by other Special Agents of the Federal Bureau of Investigation, Your Affiant is familiar with the following facts and circumstances which are based upon information from two reliable sources, personal observation, physical surveillances and checks of official records, to wit:

A. INFORMANT INFORMATION

SOURCE ONE:

Your Affiant has received extensive information concerning the personnel and operation of the aforesaid illegal gambling business from an undisclosed confidential informant (hereinafter referred to as "Source One.") Your Affiant believes Source One's information to be reliable because Source One has furnished information to the Buffalo Field Office of the Federal Bureau of Investigation concerning the illegal gambling activities and other criminal activities in the Buffalo, New York area, including the activities of Joseph A. Lombardo for the past six years. Information furnished by Source One during this time period has resulted in 20 arrests and 12 convictions. The information supplied by Source One has been consistently corroborated by independent investigation by Special Agents of the Federal Bureau of Investigation and by other information furnished to the Federal

Bureau of Investigation by other confidential informants. Source One has made admissions against his own Penal interest to Your Affiant on several occasions, in that, Source One has admitted being involved in sports bookmaking activities. For the reasons stated, Your Affiant believes Source One to be reliable.

Source One has advised Your Affiant as follows:

(1) In June of 1975, Source One advised Your Affiant that recently he had had a conversation with Joseph A. Lombardo during which Lombardo had stated that he was still engaged in a sports bookmaking operation. Lombardo further stated that business was slow, however, business would pick up with the start of the new football season in early September at which time Lombardo expects to move his current bookmaking operation and to open two new bookmaking offices. Lombardo also stated that Donny DiCarlo is currently working for him in his sports bookmaking operation. Through independent knowledge by personal conversations with Donny DiCarlo, Source One knows that he (Donald A. DiCarlo) formerly operated his own sports bookmaking operation, however, sometime in the past he had turned his entire sports bookmaking operation over to Joseph A. Lombardo. In return, Lombardo would give DiCarlo a certain percentage of any profits from any action Lombardo received from DiCarlo's old customers.

(2) On August 22, 1975, Source One advised Your Affiant that recently he had had a conversation with Joseph A. Lombardo during which Lombardo had stated that he was currently preparing to expand his sports bookmaking operation for the advent of the new football season. Lombardo stated that he currently had an individual by the name of Dick in his employ. Lombardo also stated that Dick and his brother, James, are currently working in Lombardo's office

and are handling the majority of the work in his present operation. Lombardo further stated that a third individual who he identified only as "Ozzie" was also working for him in the sports bookmaking operation. Lombardo mentioned that at the beginning of the new football season he would begin producing football pool tickets as a part of his bookmaking operation.

(3) On September 3, 1975, Source One advised Your Affiant that in a conversation with Joseph A. Lombardo within the past day Lombardo had stated that he is operating a sports bookmaking operation utilizing telephone numbers 716-633-2225 and 716-633-2254 to handle any wagering activity. Lombardo further stated that the office where these telephones are located is in operation on a daily basis from approximately 6:00 P.M. until approximately 8:00 P.M. Lombardo also stated that an individual he identified as Dick, a second individual he identified as Ozzie, and a third individual he identified as Dick's brother, James, would answer and accept wagers over the two above-mentioned telephones. Lombardo also stated that on occasions he will work the telephones at the above location during the peak wagering hours. Lombardo further stated that Donny DiCarlo will also on occasion work in one of the new offices of the sports bookmaking operation during the football season.

(4) On September 22, 1975, Source One advised Your Affiant that within the last three days, Source One had placed a telephone call to telephone number 716-633-2254 and that an individual who identified himself as Dick answered the telephone. A brief conversation between Source One and Dick ensued regarding the sports bookmaking business at that location. During this conversation, Dick told Source One that the Lombardo sports bookmaking operation had received on a single football game being played that day in excess of \$8,000 in wagers. Source One further advised Your Affiant that

he recognized the voice of the individual on the telephone who identified himself as Dick to be one Richard Kelsey.

(5) On September 26, 1975, Source One advised Your Affiant that within the past three days he had had a conversation with Richard Kelsey. Richard Kelsey told Source One that on Monday evenings after the sports bookmaking office discontinues receiving gambling wagers that he meets with Joseph A. Lombardo at a pre-designated location. The purpose of this meeting is for Richard Kelsey to pass on the week's wagering activities to Lombardo. Richard Kelsey stated that Lombardo keeps his customer's accounts for one week and then settles up with the customer. If at the end of one week the customer owes Lombardo any money for the past week's wagering activity, the customer must pay. Similarly, if at the end of one week's wagering activity Lombardo owes the customer any money, he will make the appropriate arrangements to pay the respective customer. Richard Kelsey further stated that during the week he keeps a running tabulation of each customer's account and that on Monday evenings, he meets with Lombardo and hands over these account tabulations to Lombardo.

(6) On September 26, 1975, Source One advised Your Affiant that recently he had had a conversation with Joseph A. Lombardo. Lombardo stated that James Kelsey works for his sports bookmaking operation in the football pool card aspect of the operation. Lombardo stated that during the early part of each week, James Kelsey takes the football pool cards and distributes them to various individuals at different locations in the Buffalo, New York area. These individuals, in turn, distribute them to individual bettors. On the following Saturday mornings, between approximately 9:00 A.M. and 10:00 A.M., James Kelsey meets with the individuals, to whom he had previously distributed the football pool cards, and collects the football pool cards and any monies wagered on the cards. Then,

James Kelsey, either directly himself or through his brother, Richard Kelsey, turns the monies wagered on the football pool cards over to Joseph A. Lombardo. It is a part of James Kelsey's responsibilities to insure that the individual distributors of the football pool cards have received their proper percentage commissions and that all of the remaining wagered monies, less these commissions, are turned over to Lombardo. Within a day or two, James Kelsey then turns the football pool cards over to Lombardo who figures out who are the winners on that week's football pool cards. During the early part of the following week, Lombardo distributes any winnings back to James Kelsey for re-distribution to the winning bettors. At approximately the same time, James Kelsey will distribute the new football pool cards for the following week's games and the above process is repeated.

(7) On September 30, 1975, Source One advised Your Affiant that he has been personally acquainted for approximately ten years with a bettor in the Buffalo area (hereinafter referred to as Bettor A) and that Bettor A has placed bets with Source One on numerous occasions in the past. Source One believes that the information provided by Bettor A is reliable because Source One has previously relied upon Bettor A's information in conducting his own bookmaking activities and has never found the information to be inaccurate or misleading. Source One has found Bettor A's information to be consistent with Source One's own personal knowledge and extensive familiarity with sports bookmaking activities in the Buffalo area. To identify Bettor A would endanger the identity of Source One.

On September 27, 1975, Bettor A informed Source One that he had been placing bets on a regular basis during the past two months with the Joseph A. Lombardo sports bookmaking operation, and

that earlier that same day, Bettor A had telephoned number 716-633-2225 and placed a \$100 wager on the outcome of a college football game being played that day.

(8) On September 30, 1975, Source One advised Your Affiant that he has been personally acquainted for over five years with a bettor in the Buffalo area (hereinafter referred to as Bettor B) and that Bettor B has placed bets with Source One on numerous occasions in the past. Source One believes that the information provided by Bettor B is reliable because Source One has previously relied upon Bettor B's information in conducting his own bookmaking activities and had never found the information to be inaccurate or misleading. Source One has found Bettor B's information to be consistent with Source One's own personal knowledge and extensive familiarity with sports bookmaking activities in the Buffalo area. To identify Bettor B would endanger the identity of Source One.

On September 29, 1975, Bettor B, while in the presence of Source One, placed a telephone call to number 716-633-2254 and Source One heard Bettor B place a \$50 wager on the outcome of the Green Bay-Denver professional football game. Immediately following the telephone call, Bettor B told Source One that he had talked to "Dick", gotten the line information on the Green Bay game and had placed a \$50 wager on that game.

On October 16, 1975, Source One advised Your Affiant that within the past four days he had had a conversation with Joseph A. Lombardo regarding sports bookmaking operations. Lombardo stated that his business office had been doing a great volume of business over the past two weekends because there had been many "attractive" football games. He further stated that the same two telephone numbers that he had previously given to Source One, over which Lombardo receives his sports bookmaking action, were still in operation and the business was very good. Lombardo also stated that on weekends, an individual he identified only as "Ozzie" was working the telephones at a second sports bookmaking office. On some occasions Donny DiCarlo helps "Ozzie" by working the telephone. If it is a very busy weekend, or if there is an "attractive" game with a lot of money wagered on it, Lombardo would go in and help out in the office. Lombardo stated that Richard Kelsey must meet with him (Lombardo) at least once a week to give him that week's wagering action. "Ozzie", unless Lombardo has worked with him during that week, must also meet with Lombardo once a week to give him that week's action. Lombardo stated that business is good and that the same people are working in the office. Lombardo further stated that James Kelsey, every Saturday, is still operating the football pool ticket operation. Lombardo further stated that there is a new guy who has been working the phones with Richard Kelsey for approximately the past month and he is doing well in the operation.

On October 31, 1975, Source One advised Your Affiant that within the past five days he had had a conversation with Richard Kelsey. Kelsey stated that he (Kelsey) and his partner had been doing a large amount of business at their office. Kelsey further stated that they had taken a great deal of action over the past weekend.

SOURCE TWO:

Your Affiant has received information concerning the personnel and operation of the aforesaid illegal gambling business from an undisclosed confidential informant (hereinafter referred to as "Source Two"). Your Affiant believes Source Two's information to be reliable because Source Two has furnished information to the Buffalo Field Office of the Federal Bureau of Investigation concerning illegal gambling activities and other criminal activities in the Buffalo, New York area, including the activities of Joseph A. Lombardo for the past two years. Source Two has furnished information on at least 50 occasions during this time period which information has been consistently corroborated by independent investigation by Special Agents of the Federal Bureau of Investigation and by other information furnished to the Federal Bureau of Investigation by other confidential informants. Source Two has made admissions against his own penal interest to Your Affiant on several occasions, in that, he has admitted being involved in sports bookmaking activities. For the reasons stated, Your Affiant believes Source Two to be reliable.

Source Two has advised Your Affiant as follows:

(1) In November of 1974, Source Two advised Your Affiant that recently he had had a conversation with Donald A. DiCarlo during which DiCarlo stated that he had transferred all of his sports bookmaking customers to Joseph A. Lombardo in return for a certain percentage of the profits from any wagers placed with Lombardo by DiCarlo's former customers.

(2) In April, 1975, Source Two advised Your Affiant that

recently he had a conversation with Donald A. DiCarlo during which DiCarlo stated that he and Joseph A. Lombardo were currently operating a sports bookmaking operation.

(3) On October 1, 1975, Source Two advised Your Affiant that he has been personally acquainted for approximately eight years with a bettor in the Buffalo area (hereinafter referred to as Bettor "C") and that Bettor C has placed bets with Source Two on numerous occasions in the past. Source Two believes that the information provided by Bettor C is reliable because Source Two has previously relied upon Bettor C's information in conducting his own bookmaking activities and never has found the information to be inaccurate or misleading. Source Two has found Bettor C's information to be consistent with Source Two's own personal knowledge and extensive familiarity with sports bookmaking activities in the Buffalo area. To identify Bettor C would endanger the identity of Source Two.

On September 29, 1975, Bettor C informed Source Two that he had been placing bets on a regular basis during the past two months with the Joseph A. Lombardo sports bookmaking operation, and that earlier that same evening, Bettor C had telephoned number 716-633-2225 and had placed a \$50 wager with a person who identified himself as "Dick" on the outcome of a professional football game being played that evening.

C. PHYSICAL SURVEILLANCES

1. September 6, 1975

At approximately 11:35 AM, a surveillance Agent located in the vicinity of 291 Palmdale Drive, Amherst, New York observed a two-door green Ford bearing New York State License No. 596 EDQ, parked in a parking area alongside the above mentioned address. At approximately the same time, a late model dark blue two-door Chevrolet Chevelle bearing New York State License No. 122 EVI was also observed in the parking area in front of the above mentioned address. At approximately 11:50 AM, Joseph A. Lombardo, known to the surveillance Agent from prior investigations, was observed departing 291 Palmdale Drive via the rear door and leaving the vicinity in the above described green Ford.

2. September 8, 1975

At approximately 6:40 PM, surveillance Agents observed a dark blue Chevrolet Chevelle bearing New York State License No. 122 EVI parked in a shopping plaza located near the intersection of Maple and Transit Roads, a distance of approximately 750 to 1,000 feet from the building located at 291 Palmdale Drive. At approximately 7:45 PM, Richard Kelsey, known to the surveillance Agents from photographs supplied them by Your Affiant, was observed in the company of an unidentified white male and an unidentified white male child approximately eight to ten years old, leaving the area in front of 291 Palmdale Drive. The two men and the boy were observed walking to the location of the above-mentioned Chevrolet Chevelle, entering the vehicle and departing the area.

3. September 9, 1975

At approximately 5:59 PM, surveillance Agents observed Richard Kelsey, driving a dark blue Chevrolet Chevelle bearing New York State License No. 122 EVI, park in the rear of 291 Palmdale Drive. At approximately 6:01 PM, Richard Kelsey was observed proceeding on foot to the entrance of 291 Palmdale Drive. At approximately 7:48 PM, Richard Kelsey was observed departing the vicinity of 291 Palmdale Drive, entering the above described Chevrolet and proceeding out of the Dannybrook Apartment complex area.

4. September 10, 1975

At approximately 5:58 PM, a surveillance Agent observed a dark blue two-door Chevrolet Chevelle bearing New York State License No. 122 EVI parked in front of 291 Palmdale Drive. At 9:12 PM, Richard Kelsey was observed exiting the front entrance of 291 Palmdale Drive and entering the above described Chevrolet in the parking area.

5. September 11, 1975

At approximately 5:59 PM, a surveillance Agent observed a dark blue Chevrolet Chevelle bearing New York State License No. 122 EVI parked in front of 291 Palmdale Drive. At approximately 7:46 PM, Richard Kelsey was observed exiting the front entrance of 291 Palmdale Drive, entering the above described Chevrolet and departing the area.

6. September 13, 1975

At approximately 11:35 AM, surveillance Agents observed a dark blue Chevrolet Chevelle bearing New York State License No. 122 EVI parked almost directly in front of the front door of 291 Palmdale Drive. At approximately 2:08 PM, Richard Kelsey was observed walking away from the immediate vicinity of 291 Palmdale Drive, entering the above described vehicle and departing the area. At approximately 5:50 PM, Richard Kelsey was observed driving the above described Chevrolet in the immediate vicinity of the Dannybrook Apartment complex. Kelsey proceeded toward the building located at 291 Palmdale Drive, but turned east rather than west when he reached the immediate vicinity of 291 Palmdale Drive, and departed the area. At approximately 5:55 PM, Richard Kelsey, driving the above described Chevrolet, returned to the parking area and parked immediately in front of 291 Palmdale Drive. At approximately the same time Joseph A. Lombardo was observed exiting a green two-door Ford, bearing New York State License No. 596 EDQ, which was parked two car lengths away from the vehicle Richard Kelsey was driving. Lombardo waved to Richard Kelsey and then both of them proceeded into the building at 291 Palmdale Drive.

At approximately 7:44 PM, Joseph A. Lombardo and Richard Kelsey, who was walking several steps behind Lombardo, were observed leaving the immediate vicinity of 291 Palmdale Drive. Lombardo entered the above described green Ford and Kelsey entered the above described blue Chevrolet, and both men departed the Dannybrook Apartment complex area.

7. September 14, 1975

At approximately 11:02 AM, a surveillance Agent observed a blue Chevrolet Chevelle bearing New York State License No. 122 EVI parked at the north entrance of 291 Palmdale Drive. At approximately 12:21 PM, the above described blue Chevrolet was still observed parked at the north entrance of 291 Palmdale Drive.

8. September 16, 1975

At approximately 7:22 PM, a surveillance Agent observed a blue Chevrolet Chevelle bearing New York State License No. 122 EVI parked at the north entrance of 291 Palmdale Drive. At approximately 9:01 PM, Richard Kelsey was observed exiting the north entrance of 291 Palmdale Drive, walking directly to the above described Chevrolet, entering the vehicle and departing the area.

9. September 19, 1975

At approximately 5:48 PM, a surveillance Agent observed Richard Kelsey driving a late model dark blue Chevrolet Chevelle, bearing New York State License No. 122 EVI park in front of 291 Palmdale Drive and thereafter enter the building. At approximately 5:53 PM, an unidentified white male, driving a 1966 white four-door Chevrolet, bearing New York State License No. 853 KEF parked alongside 291 Palmdale Drive and thereafter entered the building. At approximately 7:38 PM, the above mentioned unidentified white male in the company of Richard Kelsey, departed 291 Palmdale Drive. The unidentified white male entered the white Chevrolet, Kelsey entered the blue Chevrolet Chevelle, and both men departed the area in their respective cars.

10. September 20, 1975

At approximately 11:50 AM, a surveillance Agent observed Richard Kelsey driving a late model dark blue Chevrolet Chevelle, bearing New York State License No. 122 EVI proceeding in an easterly direction on Brian Road near Palmdale Drive. Kelsey was observed to drive across Palmdale Drive, enter the Dannybrook Apartment complex and to look in several directions while entering the complex area. Kelsey drove his vehicle around several of the apartment buildings in the complex and returned to the point where he originally entered the complex, all the time still turning his head and looking in several directions. Kelsey then departed the immediate area. At approximately 11:56 AM, Richard Kelsey, driving the above described Chevrolet, entered the Dannybrook Apartment complex area, parked his vehicle directly across from the front door of 291 Palmdale Drive and entered the building. At approximately 12:10 PM, a white 1966 Chevrolet four-door sedan, bearing New York State License No. 853 KEF, was observed parked on the westerly side of the building located at 291 Palmdale Drive. At approximately 2:30 PM, a spot check of the vicinity of 291 Palmdale Drive disclosed that the Chevrolet Chevelle and the 1966 white Chevrolet sedan had some time previously departed the area of 291 Palmdale Drive.

11. September 21, 1975

At approximately 12:08 PM, a spot check by a surveillance Agent disclosed that a 1966 white Chevrolet four-door sedan bearing New York State License No. 853 KEF was parked at the north entrance of 291 Palmdale Drive. Subsequent spot checks at approximately 1:12 PM, 2:23 PM, 3:18 PM and 4:02 PM disclosed the white Chevrolet parked in the same location. A subsequent spot check at approximately 4:18 PM disclosed that the white Chevrolet had some time within the previous 16 minutes departed the area of 291 Palmdale Drive.

12. September 22, 1975

At approximately 6:14 PM, a surveillance Agent observed a 1966 white Chevrolet bearing New York State License No. 853 KEF parked at the north entrance of

291 Palmdale Drive. An unidentified white male was observed sitting in the white Chevrolet. At approximately 6:28 PM, a dark blue Chevrolet Chevelle, bearing New York State License No. 122 EVI, was observed parked at the easterly end of the Dannybrook Apartment complex a short distance from where the building at 291 Palmdale is located. At approximately 6:34 PM, the white Chevrolet, bearing New York State License No. 853 KEF was observed parked at the same above described location, but the occupant was no longer in the vehicle. At approximately 8:12 PM, an unidentified white male was observed entering the white Chevrolet, bearing New York State License No. 853 KEF and departing from the immediate area.

13. September 23, 1975

At approximately 6:14 PM, a surveillance Agent observed Richard Kelsey driving a dark blue Chevrolet Chevelle bearing New York State License No. 122 EVI, through the rear area of the Dannybrook Apartment complex near Palmdale Drive. At approximately 6:16 PM, Richard Kelsey was observed parking the blue Chevrolet Chevelle on the north side of the apartment house located at 291 Palmdale Drive. Kelsey was observed exiting the vehicle and entering the apartment building.

14. September 29, 1975

At approximately 2:53 PM, surveillance Agents located in the vicinity of the Cambridge Apartment Building, 1260 North Forest Road, Williamsville, New York, observed a white 1966 Chevrolet, bearing New York State License No. 853 KEF parked in a parking lot on the easterly side of the apartment building.

At approximately 5:55 PM, surveillance Agents located in the vicinity of the apartment building located at 291 Palmdale Drive, observed an unidentified white male driving a white 1966 Chevrolet bearing New York State License No. 853 KEF entering the Dannybrook Apartment complex near the building located at 291 Palmdale Drive. The driver of the vehicle entered the complex from Palmdale Drive, drove past the northerly entrance and departed the area. A short time later the white Chevrolet returned and parked directly in front of the north entrance of 291 Palmdale Drive. The unidentified white male driver remained in the vehicle after shutting off the

engine and was observed slowly moving his head around and observing the area surrounding the building at 291 Palmdale Drive. At approximately 5:57 PM, Richard Kelsey was observed in a blue 1962 Chevrolet bearing New York State License No. 122 EVI entering the parking lot and parking his vehicle next to the above described white Chevrolet. Kelsey, and the white male driver of the white Chevrolet, exited their vehicles, engaged in a conversation in front of the two vehicles and both entered the north entrance of 291 Palmdale Drive. The male driver of the white Chevrolet was observed by the surveillance Agents to be approximately 5'11" tall, 25 years of age, heavy build with long dark hair. At approximately 8:09 PM, Richard Kelsey and the white male were observed exiting the north entrance of 291 Palmdale Drive and entering their respective vehicles. Both cars were observed to then depart the immediate area. At approximately 8:20 PM, surveillance Agents observed the above described white Chevrolet parked in the previously described parking area at the Cambridge Apartment House located at 1260 North Forest Road, Williamsville, New York.

15. October 6, 1975

At approximately 5:50 PM, a surveillance Agent located in the vicinity of the Cambridge Apartment Buildings, 1260 North Forest Road, Williamsville, New York, observed a white-over-blue Chevrolet Camaro bearing New York State License (NYSL) No. 414-TNH, departing the parking area at the above-mentioned address. The vehicle was driven by a white male individual believed to be Jack M. Silverstein. (A check by Your Affiant with the New York State Department of Motor Vehicles discloses that the white-over-blue Chevrolet Camaro bearing NYSL No. 414-TNH is registered to one Elaine A. Silverstein, 1260 North Forest Road, Williamsville, New York.)

At approximately 5:56 PM, surveillance Agents located in the vicinity of 291 Palmdale Drive, Amherst, New York, observed the above-described Chevrolet Camaro enter the parking area surrounding 291 Palmdale Drive. The driver (Silverstein) of the vehicle slowly turned his head, surveying the area surrounding 291 Palmdale Drive. At approximately 5:59 PM, the Chevrolet Camaro was observed departing the area of 291 Palmdale Drive. At approximately 6:00 PM, the Chevrolet Camaro was observed returning to the parking lot surrounding 291 Palmdale Drive, where Silverstein parked the vehicle and continued to slowly turn his head, surveying the surrounding area.

At approximately 6:02 PM, a blue Chevrolet Chevelle bearing NYSL No. 122-EVI, was observed entering the parking area surrounding 291 Palmdale Drive, and parking at the north entrance of the building. At approximately the same time, the driver (Silverstein) of the Chevrolet Camaro departed his vehicle and entered the building at 291 Palmdale Drive. At approximately 6:03 PM, Richard Kelsey departed the Chevrolet Chevelle and also entered the building at 291 Palmdale Drive.

At approximately 6:04 PM, a surveillance Agent located in the building at 291 Palmdale Drive, observed a white male individual enter the building and stop at the north entrance to the building. At approximately 6:05 PM, the surveillance Agent observed Richard Kelsey enter the north entrance of 291 Palmdale Drive, whereupon Kelsey and the other white male (Silverstein) proceeded to the second floor of the building. Kelsey was observed putting a key into the door of Apartment #6, opening the door and together with Silverstein entering the apartment.

At approximately 8:01 PM, Richard Kelsey and Silverstein, who was the driver of the Chevrolet Camaro, exited the north entrance of 291 Palmdale Drive and entered the Chevrolet Camaro. The Chevrolet Camaro drove around the building located at 291 Palmdale Drive and returned to its original parking spot. Richard Kelsey then departed the Chevrolet Camaro and entered the Chevrolet Chevelle, whereupon both vehicles departed the general area.

16. October 7, 1975

At approximately 6:12 PM, surveillance Agents located in the vicinity of 291 Palmdale Drive, observed Richard Kelsey driving a Chevrolet Chevelle, bearing NYSL No. 122-EVI, park at the north entrance of 291 Palmdale Drive. Kelsey was observed to depart his vehicle and enter the building.

At approximately 6:14 PM, a white male individual, believed to be Jack M. Silverstein, driving a white Chevrolet bearing NYSL No. 853-KEF, park in the vicinity of 291 Palmdale Drive. Silverstein was observed to depart his vehicle and enter the building.

A spot check by surveillance Agents at approximately 7:30 PM disclosed that the white Chevrolet bearing NYSL No. 853-KEF had departed the area.

At approximately 8:59 PM, surveillance Agents observed lights in Apartment #6 at 291 Palmdale Drive go out. At approximately 9:00 PM, Richard Kelsey was observed departing the building, entering his vehicle departing the area.

17. October 13, 1975

At approximately 5:46 PM, surveillance Agents located in the vicinity of 291 Palmdale Drive, observed Richard Kelsey driving a blue Chevrolet, bearing NYSL No. 122-EVI, park in the parking area surrounding 291 Palmdale Drive. At approximately the same time, a white Chevrolet bearing NYSL No. 853-KEF was observed to enter the parking area and to park on the side of 291 Palmdale Drive. Richard Kelsey greeted the white male, believed to be Jack M. Silverstein, driving the white Chevrolet, whereupon both men entered the building located at 291 Palmdale Drive.

At approximately 8:02 PM, surveillance Agents observed the lights in Apartment #6 at 291 Palmdale Drive to go out. At approximately 8:03 PM, Richard Kelsey was observed leaving the building at 291 Palmdale Drive, entering his vehicle, and driving in a slow manner until his vehicle was parked immediately alongside of the white Chevrolet bearing NYSL No. 853-KEF. At approximately 8:04 PM, a white male individual (Silverstein) was observed leaving the building located at 291 Palmdale Drive, walking toward Richard Kelsey's vehicle, where he appeared to talk with Kelsey for a few moments and then enter his vehicle.

At approximately 8:10 PM, surveillance Agents followed Richard Kelsey's vehicle to a Friendly Ice Cream store, located at 870 Maple Road, Amherst, New York. Kelsey parked his vehicle next to a green Ford bearing NYSL No. 596-EDQ, driven

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by Joseph A. Lombardo. The drivers of the two vehicles (Kelsey and Lombardo) were observed to roll down their car windows and to engage in a conversation with each other. At approximately 8:13 PM, Richard Kelsey was observed departing the area.

C. RECORDS CHECK

On September 30, 1975, Your Affiant caused the records of the New York Telephone Company, Buffalo, New York to be checked. These records disclosed the following information:

(1) Telephone Facility (716) 633-2254 is subscribed to by D. Lanson, 291 Palmdale Drive, Apartment 6, Williamsville, New York. This telephone facility was initially installed and connected on July 16, 1975. The records for this number disclose (a) the telephone number is billed at the above mentioned address to Joseph Lanson, (b) Joseph Lanson lists his employment as a manufacturing representative for the 3-M Company, St. Paul, Minnesota, and (c) Joseph Lanson lists that he was previously employed as a contractor.

(2) Telephone Facility (716) 633-2225 is subscribed to by Joseph Lanson, 291 Palmdale Drive, Apartment 6, Williamsville, New York. This telephone facility was installed and connected on July 16, 1975. The records for this telephone disclose that it is subscribed to by and billed to Joseph Lanson at the above mentioned address.

On September 25, 1975, Your Affiant caused the Personnel Records of the 3-M Company in Buffalo, New York and the main offices of the Company in St. Paul, Minnesota to be checked. These records disclosed that no person by the name of Joseph Lanson is presently employed by the 3-M Company.

On September 25, 1975, Your Affiant caused the records of the National Fuel Gas of Buffalo Company to be checked. These records disclosed that in July of 1975, National Fuel Gas commenced gas service at Apartment 6, 291 Palmdale Drive, Amherst, New York. This service was listed and billed to Joseph Lanson.

On September 25, 1975, Your Affiant caused the records of Niagara Mohawk Power Corporation to be checked. These records disclosed that electric service was initiated at Apartment 6,

291 Palmdale Drive, Amherst, New York on July 16, 1975. The records further reflected that the service was listed and billed to a Joseph Lanson, indicated that Lanson was employed with the 3-M Company, and listed no previous electric service for that name.

On September 22, 1975, Your Affiant caused the records of the New York State Department of Motor Vehicles to be checked. These records disclosed the following:

(1) New York State License No. 596 EDQ is a green 1973 Ford Sedan, registered to Joseph A. Lombardo, Date of Birth 9/25/37, 195 Temple Drive, Cheektowaga, New York.

(2) New York State License No. 122 EVI is a blue 1973 Chevrolet, two-door Sedan, registered to James W. Kelsey, Date of Birth 6/5/35, 5 Pritchard Street, Buffalo, New York.

(3) New York State License No. 853 KEF is a white 1966 Chevrolet, four-door Sedan, registered to Jack Silverstein, Date of Birth 5/25/36, 1260 North Forest Road, Williamsville, New York.

On September 29, 1975, Your Affiant caused the records at the Buffalo Police Department, the Erie County Sheriff's Office, and the Federal Bureau of Investigation Identification Records to be checked. These records disclosed the following information:

(1) Joseph A. Lombardo has been arrested three times since 1964 for (1) Maintaining a Premises for Gambling, (2) Bookmaking and Possession of Bookmaking Records, and (3) Interstate Transportation of Wagering Information. The first charge was subsequently dismissed, the disposition of the second charge is unknown, and the third charge resulted in a hung jury and was subsequently dismissed for failure to afford a speedy retrial.

In December of 1970, Joseph A. Lombardo, Frank Thomas Stasio and Frank Joseph Masterana (of Las Vegas) were indicted in Federal District Court in Buffalo, New York on twelve counts of using interstate telephone facilities in aid of an unlawful gambling business (sports bookmaking) and conspiracy (18 U.S.C. Sections 1952 and 371). During the trial of the case (which resulted in a hung jury and eventual dismissal for failure to afford a speedy retrial), electronic surveillance evidence and bettor testimony established that Lombardo and Stasio were involved in a sports bookmaking business continuously between approximately 8/1/70 and 12/12/70. The testimony of rental agents and accommodating lessees indicated that Lombardo rented or utilized some five apartments between April and December of 1970. He was identified as the lessee of apartments rented under the names "Joseph Perez" and "Joseph Barone". In three other instances, he utilized apartments of friends for conducting his bookmaking operation. He caused two telephones to be installed in each of the apartments utilized. Lombardo was also identified as one "Joseph Raymond" who rented a safety deposit box from which Agents seized some \$96,700 in December of 1970. Sports bookmaking records were recovered in the apartment utilized by Lombardo as an office on December 12, 1970. The evidence also indicated that Lombardo and Stasio were engaged in illegal sports bookmaking, that Lombardo needed a bookmaker's line on a daily basis, that Masterana was in the business of furnishing a bookmaker's line on sporting events and that Lombardo made telephone calls to Masterana from pay phones each day before beginning his bookmaking activities. The facts and circumstances recited above are a matter of public record from the public trial.

Your Affiant believes that the same modus operandi as outlined above is being utilized by Joseph Lombardo in this illegal gambling business.

(2) Donald A. DiCarlo has been arrested on six occasions since 1964 for various gambling violations. These arrests resulted in one conviction in January of 1973. The remaining charges have been either dismissed or the disposition is unavailable at this time.

(3) Richard Kelsey has been arrested on three occasions since 1967. In 1967, he was arrested for Criminal Mischief; disposition of this charge is currently unavailable. In April of 1972, he was arrested and charged with two counts of Possession of Gambling Records. In August of 1972, he pleaded guilty to a reduced charge of Disorderly Conduct. On July 7, 1975, he was arrested and charged with four Misdemeanor gambling violations by the Buffalo Police Department. These latter charges are currently pending.

D. IDENTITY OF JACK M. SILVERSTEIN

Your Affiant believes Jack M. Silverstein to be the white male individual observed driving the 1966 white Chevrolet bearing New York State License No. 853-KEF, for the following reasons:

(a) Your Affiant and other Special Agents of the Federal Bureau of Investigation have observed a white 1966 four door Chevrolet sedan bearing New York State License 853-KEF parked at the 291 Palmdale address on seven occasions as outlined in the Surveillance section of this affidavit. On two of these surveillances the driver of this white Chevrolet was observed to follow a circuitous route in and around the Dannybrook Apartment Complex prior to his stopping at the building located at 291 Palmdale Drive. This unidentified white male was also observed slowly surveying the surrounding areas prior to his stopping and entering the building. The driver of this white Chevrolet was observed by the Agents to park his vehicle and wait outside the premises at 291 Palmdale Drive. When another suspect, Richard Kelsey, arrived the Agents observed Kelsey and the unknown individual converse and then enter the building. The surveillance Agents observed Richard Kelsey and the unidentified white male individual talking with each other and waving to each other on entering 291 Palmdale Drive. The Agents also observed Kelsey and the unknown individual depart the building together still talking to each other.

(b) A check with the New York State Department of Motor Vehicles indicates that this white Chevrolet, bearing New York State

license 853 KEF, is registered to one Jack M. Silverstein, 1260 North Forest Road, Williamsville, New York. The information also discloses that Jack M. Silverstein is a male individual, 5'9" in height, and has hazel eyes. The unidentified male individual that Your Affiant and other surveillance Agents have observed driving the above mentioned white Chevrolet in the vicinity of 291 Palmdale Drive is an individual approximately 5'9" in height.

(c) A check with the New York Telephone Directory, white pages, and the Haines Directory for the Buffalo area, lists a Jack M. Silverstein at 1260 North Forest Road, Williamsville, New York.

(d) As reflected in the Surveillance section of this affidavit Your Affiant and other Special Agents of the Federal Bureau of Investigation have observed the above mentioned white Chevrolet, bearing New York license 853 KEF parked at an apartment building located at 1260 North Forest Road, Williamsville, New York on September 29, 1975 at approximately 2:53 P.M. At approximately 5:55 P.M., the same vehicle was observed at 291 Palmdale Drive. At 8:09 P.M., the above described unidentified white male exited the building at 291 Palmdale Drive, entered the above described white Chevrolet, and departed the immediate area. At 8:22 P.M., the same white Chevrolet was observed parked in a parking spot near an apartment house at 1260 North Forest Road, Williamsville, New York.

For all of the above reasons, Your Affiant believes that the unidentified white male who has been observed driving the white Chevrolet, bearing New York State license 853 KEF is Jack M. Silverstein.

E. NEED FOR INTERCEPTION

1. Your Affiant believes that normal investigative techniques will not result in an indictment or conviction of all of the co-conspirators in the aforesaid illegal gambling business for the following reasons:

(a) Sources One and Two have both stated that they will not testify as to the information they have provided.

(b) Your Affiant knows through personal experience that conventional search and seizure will not produce sufficient evidence upon which to base a conviction under Section 1955 of Title 18 of the United States Code because gamblers do not normally keep permanent records and are able to destroy such temporary records as they do possess immediately prior to or during a search. (Your Affiant has been informed that on July 7, 1975, when Richard Kelsey was arrested by the Buffalo Police Department, he was observed burning gambling notes and other gambling paraphernalia as the Buffalo Police officers entered the premises. By the time the officers reached Kelsey, he had destroyed all of the papers, and flung the remaining ashes in the officers' faces.)

(c) Even if such records were obtainable, it would be difficult or impossible to prove that the individuals whose code names and numbers might appear on the records were "conductors, financers, managers, supervisors, directors or owners" of the illegal gambling business as required by Section 1955 of Title 18 of the United States Code, rather than mere "players".

(d) Continued surveillance of the known location and

facilities of the aforesaid illegal gambling business would not provide information sufficiently specific as to the conduct and participation of the co-conspirators to obtain an indictment or a conviction, and as outlined in the Surveillance section of this affidavit continued surveillance of the known locations and known participants of the aforesaid illegal gambling business appear unlikely to succeed because of the "surveillance consciousness" and the cautious manner in which the known participants have been observed to act in their arrival and departure from the known location at 291 Palmdale Drive.

(e) The apartment building located at 291 Palmdale Drive is situated in an open area completely surrounded on all sides by open parking areas and fields. A continuous moving or a stationary surveillance in the vicinity of the area is extremely difficult to maintain for any extended period of time without the surveillance Agents being observed by the suspects, especially in view of the cautious manner in which the suspects approach and depart the area of 291 Palmdale Drive as reflected in the Surveillance section of this affidavit.

(f) The location of the building in this open area would also prevent any Agents attempting to execute a search warrant, from approaching the building without going unobserved by the suspects, which observations would allow the suspects sufficient time to destroy any books and records of the illegal gambling business prior to the Agents' execution of a search warrant.

2. Your Affiant further believes that evidence sufficient to prove the organization, locations, participants and conduct of the aforesaid illegal gambling business can only be obtained through court authorized interception conducted by Your Affiant and other Special

Agents of the Federal Bureau of Investigation working with Your Affiant for a period not to exceed twenty (20) days from the date of the order. Furthermore, Your Affiant believes that the aforesaid evidence most directly obtainable by the interception of wire communications over the telephone facilities 716-633-2254 and 716-633-2225, for the purpose of establishing the continuous existence and size of the business, and the identity of individual players who are prospective Government witnesses.

3. Your Affiant further believes, based upon past experience with gambling violations, and the particular facts of this investigation, that after the described communications have first been intercepted, additional communications of the same type will occur because the described illegal gambling business is a continuing enterprise which requires repeated transactions in order to succeed. The interception of more than one such communication will be necessary in order to determine the identities of each of the co-conspirators and the extent and nature of their participation sufficient to convict them. For these reasons, the electronic surveillance should not terminate upon the interception of the first described type of communication, but should continue until the objective of the investigation is attained or for a period of twenty (20) days from the date of the order, whichever occurs first.

4. The following are the only court authorizations known to Your Affiant to intercept wire or oral communications involving the persons named herein or the facilities or locations specified herein: (a) an Order issued on December 3, 1970 by the Honorable John T. Curtin, United States District Court for the Western District of New York, for the telephone facilities bearing telephone numbers 716-633-9691 and 716-631-5659 located at 964 Dick Road (Lower), Cheektowaga, New York, directed against Joseph A.

Lombardo, and (b) an Order issued on December 7, 1970 by the Honorable John T. Curtin, United States District Court for the Western District of New York, for the telephone facilities bearing telephone number 716-683-9808 located at Skaros Restaurant, Dick-Urban Plaza, Cheektowaga, New York, directed against Joseph A. Lombardo.

5. A search of the Federal Bureau of Investigation indices has been conducted at the Buffalo, New York and Washington, D.C. offices of the Federal Bureau of Investigation for additional previous electronic surveillances of the subjects of this investigation. The result of that search is negative.

6. Congress did find as set forth in the Statement of Special Findings in Title VIII of the Organized Crime Control Act of 1970 that illegal gambling involves widespread use of and has an effect on interstate commerce and the facilities thereof.

WHEREFORE, on the basis of the facts and circumstances aforesaid, Your Affiant submits that there is probable cause to believe: That the described violations of the Federal gambling laws have occurred, are presently occurring and will continue to occur; That the normal investigative techniques have failed to produce evidence necessary to sustain a prosecution for violation of the offenses enumerated in paragraph two, supra, and reasonably appear to be unlikely to succeed; That an Order of this Court should be issued authorizing the interception of wire communications over the previously described facilities; That the said Order should not terminate upon the first interception of the particular type of communication described, but should continue until the interceptions reveal both the manner in which the above-named co-conspirators and others as yet unknown participate in the illegal use of telephone

facilities for the transmission of bets and betting information in furtherance of the said illegal gambling business and the identities of confederates and participants in the operation, the places of operation of the illegal gambling business, the nature of the conspiracy involved therein and its method of operation, or for a period not to exceed twenty (20) days, whichever occurs first.

S/s John C. Poerstel
JOHN C. POERSTEL
Special Agent
Federal Bureau of Investigation

Sworn to and Subscribed
to Before Me This
31st Day of October, 1975

S/s John T. Elfvin
UNITED STATES DISTRICT COURT JUDGE

EXCERPT OF AFFIDAVIT FOR THE DECEMBER 1,
1975 APPLICATION FOR THE INTERCEPTION
OF WIRE COMMUNICATIONS
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(a) For all of the reasons previously outlined in Your Affiant's Affidavit of October 31, 1975, which is attached hereto and incorporated herein by reference.

(b) Your Affiant believes that continued interception of telephone numbers 716-633-2225 and 716-633-2254 is necessary in order to determine the identity of the newly discovered participants, the manner of the operation of the illegal gambling enterprise, the nature of the conspiracy involved, and the direct scope of the enterprise. As noted in the telephone call section of this Affidavit, information already obtained has revealed that the Joseph A. Lombardo sports bookmaking operation involves more locations and more people than originally believed. In addition, it has revealed a betting line operation which appears to be headquartered out of the New York State area. In order to achieve information needed to determine the precise scope and nature of the enterprise, as well as to garner sufficient evidence to prosecute, continued surveillance of the telephone facilities 716-633-2225 and 716-633-2254 is necessary and essential.

(c) The apartment building located at 3 Windham Court, Amherst, New York is situated in an open area surrounded on all sides by either parking areas or fields. A continuous moving or a stationary surveillance in the vicinity of this area is extremely difficult to maintain for any extended period of time without the surveillance Agents being observed by the suspects, especially in view of the manner in which the suspects approach and depart the area.

(d) The location of the building in this open area would also prevent any Agents attempting to execute a search warrant, from approaching the building without going unobserved by the suspects, which observations would allow the suspects sufficient time to destroy any books, documents, and records of the illegal gambling business prior to the Agent's execution of a search warrant.

PRE-TRIAL MOTION OF APPELLANTS ALLEGING
THAT THE APPLICATION FOR ELECTRONIC
SURVEILLANCE WAS INSUFFICIENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Rec. 6-28-76
9:00 A.M.

THE UNITED STATES OF AMERICA

vs.

JOSEPH A. LOMBARDO
DONALD A. DICARLO a/k/a "TONY"
RICHARD KILSEY
JACK M. SILVERSTEIN
EDWARD A. OWCZARZAK a/k/a "O-Z"

MEMORANDUM

1. With respect to the admissibility of electronic surveillance, it is submitted that this case is analogous to United States v. Kalustian, 529 F. 2d 585, (9th Cir.-1976). That case was originally decided August 4, 1975, amended December 11, 1975, with a re-hearing and re-hearing en banc denied March 25, 1976.

In that case as here the informants named stated that they would not testify to the information they provided. There, as here, the Government stated in their application "Furthermore, such investigative techniques as physical surveillance and the records obtainable on ***, and others as yet unknown, contained little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation the investigation of gambling cases and my association with other Special Agents who have conducted investigations of gambling activities, normal investigative procedures appear to be unlikely to succeed, etc. (Enclosed Quote). In fact that opinion continues on at 587-8 with almost verbatim the same language as contained in the application in this case. The Court cited Berger v. New York, 388 U.S. 41 (1967) to the effect "Few

threats to liberty exist which are greater than that posed by the use of electronic surveillance".

In that case as here the Court again noted that "nearly all of these 'facts' tickled into the ears of FBI Agents through the efforts of a series of professional gamblers and bookmakers. Unfortunately, as the affidavits attest, none of the underworld informants are willing to testify". The opinion went on to note that "The investigating officials decided electronic surveillance was imperative. They disregarded alternate means of further investigation because knowledge and experience in investigating other gambling cases convinced them that normal investigation procedures were unlikely to succeed". It further went on to note again almost identical language as to the application herein.

The Court also noted that "California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling cases".

The procedural steps required by Title III, 18 U.S.C. Section 2510 et seq, requires strict adherence, U.S. v. Giordano, 415 U.S. 505 (1974). That Section was written to create limited authority for electronic surveillance in the investigation of specific crimes thought to lie within the province of organized criminal activity.

It is submitted that here, as in Kalustian, the Government has not submitted sufficient evidence in their written application to justify electronic surveillance.

2. If the electronic surveillance fails, the subsequent search and seizure, which was based upon evidence obtained by the electronic eavesdropping, must also fail.

In other words, if as we contend the application for the electronic surveillance was insufficient, and the electronic surveillance is excluded, then the arrest based thereon was without probable cause and the tangible materials seized, were illegally seized.

3. The defendants Kelsey, Silverstein and Owczarzak contend that the Third Count in this indictment, which is directed solely against Joseph A. Lombardo, is prejudicial to them. It is a matter over which they had no control and were not associated with. Further such actions by the defendant, Lombardo, well might indicate to a jury a criminal intent. It is submitted, that these defendants would have no way to justify or explain the actions of Joseph A. Lombardo and should not be prejudiced by their admittance in a joint trial with them.

It is further submitted that the evidence in this case would by enlarge not be relevant with regard to the separate Count against Mr. Lombardo, and conversely the evidence in that case should not be admitted in this case against them. Judicial economy just does not warrant the joint trial of that separate Count with the Counts against these defendants.

4. The defendant Owczarzak notes that no where in the lengthly application for a Tap Order here was his name mentioned. He is aware of no outside information identifying him as a participant in the matters herein charged. Since the defendant, Owczarzak was not identified as being in the area of any of these activities, he submits that it would be extremely prejudicial to play the taps in this case with an allegation that his voice is contained thereon. This would place him in the untenable position of having a jury assume that it was his voice if he did not take the stand to refute it at trial. Certainly there is no obligation on him to testify and he

should not be placed in that position.

Respectfully submitted,

s/s Nemoyer
Boreasay
Naples

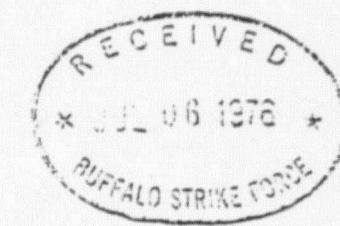
UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JOSEPH A. LOMBARDO
DONALD A. DICARLO a/k/a "TONY"
RICHARD KELSEY
JACK M. SILVERSTEIN
EDWARD A. CWCCZAK a/k/a "O-Z"



NO. CR. 76-3

MEMORANDUM

At the oral argument upon the motions in the above-captioned matter on June 23, 1976, before the HON. JOHN T. ELFVIN, United States District Court Judge, Western District of New York, the issue was raised by your Honor as to what should occur when there is an allegation of false and/or mistaken information in a search warrant or eavesdropping warrant application. The following is submitted in response to that query.

It is the defendant's position that the "need" portion of the wiretap application in the case herein contains false information in that one paragraph sets forth the fact that a certain premises is unapproachable by law enforcement officers due to the fact that it is in the open and in an un congested living area. The defendants submit that this fact is false. Based upon the following cases, it is submitted that a hearing should be held to determine the accuracy of the aforementioned information and its effect upon the eavesdropping application and the results thereof.

United States vs. Luna, 525 F.2d 4 (1975, 5th Circuit)

United States vs. Belculfine, 503 F.2d 53 (1974, 1st Circuit)

United States vs. Gonzalez, 438 F.2d 833 (1973, 2nd Circuit)

Respectfully submitted,

MAROLD J. BORGANZ
Attorney for Defendant RICHARD KELSEY

EDGAR C. REHDER
Attorney for Defendant EDWARD A. CHCIARON

JAMES P. NAPLES
Attorney for Defendant JACK M. SILVERSMITH

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trial. The attorney who stood with him is John Humann from his office who will represent Mr. Owczarzak through this situation. Mr. Silverstein is represented by Attorney James Naples, who is standing to your left. All right, we will proceed with the selection of the jury. I intend to go perhaps until one o'clock with our process of jury selection, and then we will adjourn for lunch and come back at two. Normally I will be going from nine o'clock in the morning until twelve, resuming at one, and then adjourning at four, so you can plan on that. All right.

14 CLERK: Juror #285, Norman L. Gardner.

15 MARSHAL: Juror #1.

16 CLERK: Juror #526, Ruth B. Hacker.

17 MARSHAL: Juror #2.

18 CLERK: Juror #313, Albert E. Ley.

19 MARSHAL: Juror #3.

20 CLERK: Juror #590, Martha Messinger.

21 MARSHAL: Juror #4.

22 CLERK: Juror #519, Betty L. Bartz.

23 MARSHAL: Juror #5.

24 CLERK: Juror #510, Joseph C. Zydel.

25 MARSHAL: Juror #6.

1 satisfied that every element of the federal
2 offense has been proven, you will return a
3 verdict consistent with that?

4 JUROR #12: Yes.

5 MR. DOYLE: You would have no difficulty with that?

6 JUROR #12: No.

7 MR. DOYLE: The one other question that I wanted to ask
8 briefly before talking to you a little bit
9 individually, I might be mistaken but, Mr.
10 Gardner, did you indicate that you thought
11 you might have some difficulty, sir, with
12 respect to sitting this third week, as the
13 Judge outlined it to you?

14 JUROR #1: Just a conflict of my time.

15 THE COURT: He has some extra duties in connection with
16 seasonal work, in connection with bus routings
17 in the place where he lives, and he indicated
18 to me it will be a little bit of a hardship,
19 but I have indicated to him that I think he
20 could pull this oar and that one also, hope-
21 fully.

22 MR. DOYLE: Fine. Anyone else that indicated to Judge
23 Elvvin that they thought they might have
24 difficulty sitting through the full term,
25 as he described it to you? I thought it was

just Mr. Gardner, I wasn't sure. The question that I have to ask you, Mr. Gardner, in connection with that, and I appreciate you have taken it up with the Judge and explained to him that you thought that you might have some difficulties, the question that I wanted to address to you is, you have obviously already heard the Judge say that the burden of proof rests with the Government in this case, and with Mr. Endler and Mr. O'Keefe, who are the attorneys representing the Government here, and no have no quarrel with that obviously?

JUROR #1: No.

THE COURT: You also, I am sure, heard him say that the defendants have no need whatsoever to produce any proof. Obviously they are not here by choice, they are here because an accusation has been levelled against them, they are here to respond to it, but you understand they need not prove anything?

JUROR #1: Yes, I understand.

MR. DOYLE: I think you have further heard him say, obviously, that none of the defendants, and certainly Mr. Lombardo, is under any obligation to take the stand, do you have any quarrel with that?

1 JUROR #1: None.

2 MR. DOYLE: I think you are probably well aware that this
3 is not the first time this case has been in
4 court. You don't walk in the first day that
5 it occurs and sit down and pick a jury.
6 Obviously, this case has been on the calendar,
7 there have been legal arguments, et cetera,
8 for some time. The point I am making is that
9 some time ago when this accusation was first
10 put forward, obviously Mr. Lombardo appeared
11 in court and entered a plea of not guilty.
12 The law says he doesn't have to do that again.
13 Having said once you are not guilty of the
14 federal violation, that is all he ever has to
15 do, any quarrel with that?

16 JUROR #1: No.

17 MR. DOYLE: Does any one at all here feel that if in fact
18 Mr. Lombardo did not take the stand that some-
19 how in your own mind you would feel, 'Well,
20 he must be hiding something, I wonder why he
21 didn't take the stand,' does anyone have that
22 feeling right now? Now is the time that we
23 need to know about it. Anybody have any
24 quarrel with what Judge Elvvin has told you?
25 He has already said he is not guilty of this

federal violation, he don't have to take the stand and say it again. He already said it once, he said it in open court, and he said he wasn't guilty. Does anybody have any quarrel about that, anybody feel deprived or angry if he didn't take the stand and repeat it? Would anybody feel ill toward him or feel he should have done it, 'I wanted to hear his side of the story, therefore, I am going to feel badly about him because he didn't do that,' anyone have that kind of leaning now? With all of that in mind, believe it or not, that is the prelude to the question I was going to ask you. Obviously, if the defendants do put on any proof, Mr. Gardner, obviously somebody has to go first. The Government has the burden of proof, and they go first, and if, in fact, the defendants are going to put any proof on, they come second after the Government's proof is in. I don't know at this point, and I am sure most of the lawyers don't know whether any proof is going in or not. It is conceivable that the defense may put on some proof. What happens, sir, if the defense puts on proof, obviously they are extending the time of your

services, aren't they, coming toward the tail end
of the thing, as they must.

JUROR #1: Yes.

MR. DOYLE: And the question that I am basically asking you, in light of that, in knowing that if the defendants put on proof, they will be last, and knowing that you kind of got two cars in the water, whether you feel you would be in a position where you might pay less attention to what the defense was proving than what the prosecution was proving?

JUROR #1: No, I don't think so.

MR. DOYLE: That is all we are concerned about. Somebody who might have a tight scheduling problem with the jury service, as to whether or not it is going to work to the disadvantage of the party that I'm representing, Mr. Lombardo?

JUROR #1: _____ No. _____

MR. DOYLE: All right.

THE COURT: Is this an appropriate time?

MR. COYLE: I think so.

THE COURT: We might as well hold to the schedule. We will recess until two o'clock, and I admonish all of you that although at this point we know not who will be sitting on the final jury,

1 THE COURT:

All right. Now, one other thing I should mention, you will notice that as I went through I called upon different attorneys in order, and originally I named individuals from the indictment, and what is fairly apparent will become more apparent in that same order, there is no significance, and I tell you and everyone in the room, there is no significance to be attached to the order in which people are named in the indictment or in the order that I am calling people here. I could have grabbed them out by a lottery, I could have done it alphabetically. I have picked this way in which they are set forth in the indictment, and that in and of itself means nothing. The person named number one is no more a target and no less presumed to be innocent than the person named number five. I want to make that clear at this time. Mr. Endler, your first challenge?

21 MR. ENDLER:

The Government would respectfully excuse Mr. Kirsch.

23 THE COURT:

All right, Mr. Kirsch, thank you. As jurors are excused they may leave and we will be in touch with you when we next need to have you

1 back. All right, the defense will exercise
2 jointly challenges one and two.

3 MR. DOYLE: May we approach the bench?

5 (Thereupon an off the record discussion
6 ensued at sidebar.)

8 THE COURT: I indicated, ladies and gentlemen, that the
9 defense attorneys at this juncture will be
10 exercising their challenges jointly. Now,
11 this doesn't derogate at all from the fact
12 that they are individual persons, whose
13 criminality would be individually weighed,
14 and who are individually represented, but I
15 have imposed upon the attorneys the need to
16 move along and do this jointly. There is
17 obviously some necessity for them to consult,
18 which is why I have chased them into a corner
19 to reach this consensus. They are doing that
20 and nothing more than that.

22 (Thereupon defense attorneys conferred off
23 the record.)

25 THE COURT: Is there a spokesman?

1 MR. DOYLE: Your Honor, the only way we can do it, we
2 will take turns again.

3 THE COURT: All right.

4 MR. DOYLE: By lot, I am first chosen to exercise the
5 first round. Respectfully, your Honor, defense
6 counsel will, with our thanks, excuse Juror
7 #2, Miss Hacker, and Juror #10, Miss Young.

8 THE COURT: Mrs. Young.

9 MR. DOYLE: Mrs. Young, excuse me.

10 THE COURT: All right, Miss Hacker, Mrs. Young.

11 CLERK: Juror #379, Miss Sylvie S. TeWinkle.

12 MARSHAL: Juror #2.

13 CLERK: Juror #440, Mrs. Jean E. Horton.

14 MARSHAL: Juror #8.

15 CLERK: Juror #418, Raymond Fell.

16 MARSHAL: Juror #10.

17 THE COURT: Miss TeWinkle, Mrs. Horton and Mr. Fell,
18 could you hear all the questions that were
19 asked?

20 JUROR #2: Yes.

21 JUROR #8: Yes.

22 JUROR #10: Yes.

23 THE COURT: And the names?

24 JUROR #2: Yes.

25 JUROR #8: Yes.

1 mention, obviously, being up first I do ask
2 all the questions I think about to make sure
3 they are covered, and I am sure everybody
4 knows that the order of appearance and the fact
5 that somebody is up first is not any indication
6 of anything, it is just an accident, the way
7 that the matter happens to be written up.
8 somebody has to go first, and in this case it
9 was my misfortune that it was me. Thank you
10 very much.

11 THE COURT: Mr. Jay?

12 MR. JAY: No questions.

13 THE COURT: Mr. Boreanaz?

14 MR. BOREANAZ: No questions.

15 THE COURT: Mr. Humann?

16 MR. HUMANN: No questions.

17 THE COURT: Mr. Naples?

18 MR. NAPLES: None, your Honor.

19 THE COURT: The second challenge, Mr. Endler.

20 MR. ENDLER: One second, your Honor. The Government would
21 respectfully excuse Mr. Zydel.

22 THE COURT: Thank you, Mr. Zydel. All right, gentlemen,
23 your third and fourth challenges, please.

24
25 Thereupon defense attorneys conferred off

1 the record.)

3 MR. JAY: Your Honor, on behalf of the defendants, we
4 will jointly excuse Juror #3, and Mrs. Bartz,
5 Juror #5.

6 THE COURT: Mr. Lay and Mrs. Bartz, thank you.

7 CLERK: Juror #376, Mrs. Sophie J. Swiriduk.

8 MARSHAL: Juror #3.

9 CLERK: Juror #401, Harold W. Boltz.

10 MARSHAL: JUROR #5.

11 CLERK: Juror #647, Denise M. Young.

12 MARSEAL: Juror #6.

13 THE COURT: Is it Mrs. Young or Miss.

14 1968 #6: Mrs. -

15 THE CCURT: Mrs. Young and Mrs. Swiriduk and Mr. Boltz,
16 did you hear all of the questions that were
17 asked?

18 JUNE 1948 No. 3: Yes.

19 1908 No. 5. Yes.

20 JUROR #6: Yes.

²¹ THE COURT: And all of the names?

2 HR CS #3: Yes

23 WED #5 - Yes

24 WED #6: Yes

25 THE COURT: Do you know basically what the attorneys are

1 out of the way today, rather than come back
2 in the morning, and that is my aim. We will
3 be back in five minutes and continue.
4

5 (Thereupon the court was in recess at 4:05 P.M.)
6

7 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 4:15 P.M.
8

9 (Defendants present, counsel present, jury
10 panel present.)
11

12 THE COURT: All right, everyone present. Mr. Jay?

13 MR. JAY: No questions, your Honor, thank you.

14 THE COURT: Mr. Boreanaz?

15 MR. BOREANAZ: No questions, your Honor.

16 THE COURT: Mr. Humann?

17 MR. HUMANN: No questions.

18 THE COURT: Mr. Naples?

19 MR. NAPLES: None, your Honor.

20 THE COURT: Your third challenge, Mr. Endler.

21 MR. ENDLER: Your Honor, on the third round the Government
22 would respectfully excuse Miss Messinger,
23 Juror #4.

24 THE COURT: Your fifth and sixth challenges, gentlemen.
25

1 (Thereupon defense attorneys conferred off
2 the record.)
3

4 MR. BOREANAZ: Your Honor, the defendants ask the excusal
5 of Mrs. Miller and Mr. Fell.

6 THE COURT: What was the second one?

7 MR. BOREANAZ: Mrs. Miller and Mr. Fell.

8 THE COURT: Yes, I'm sorry. Mrs. Miller and Mr. Fell.
9 thank you.

10 CLERK: Juror #438, Jack L. Hodgkiss.

11 MARSEAL: Juror #4.

12 CLERK: Juror #585, Michael C. Mason.

13 MARSHAL: Juror #7.

14 CLERK: Juror #282, Harold B. Fornes.

15 MARSHAL: Juror #10.

16 THE COURT: Mr. Hodgkiss, tell them about yourself, will
17 you please?

18 JUROR #4: I'm married, have no children, my wife works
19 for Blue Cross in Buffalo, I work for the
20 New York Telephone Company in special services.

21 THE COURT: Jury duty?

22 JUROR #4: I have had jury duty before. I have served
23 on a civil case concerning a lawsuit —

24 THE COURT: Was that in federal court?

25 JUROR #4: That was here.

1 JUROR #4: No.

2 MR. DOYLE: Did that cause you to ever be a witness in

3 any sort of a court martial proceeding or

4 military proceeding at all?

5 JUROR #4: No arrests or anything involved.

6 MR. DOYLE: Getting back to you, if I might, Mr. Mason,

7 how long have you been in this position of

8 part owner?

9 JUROR #7: Two weeks.

10 MR. DOYLE: Okay. Congratulations, I wish you all sorts

11 of success. You have heard, perhaps Mr.

12 Mason, that this trial may well extend over

13 the next two or three weeks, does it present

14 any particular problem for you?

15 JUROR #7: I'm going on vacation.

16 THE COURT: I suggested to him -- he is going on vacation

17 beginning August 30th -- I told him I didn't

18 know whether that would present a problem, I

19 would watch out for the situation.

20 MR. DOYLE: Okay. I take it if the trial did go over

21 that, it would cause a substantial problem

22 for you?

23 JUROR #7: Yes.

24 MR. DOYLE: All right, sir. Mr. Mason, you have heard

25 the question I have asked everyone, that is,

1 MR. DOYLE: Okay, fine, but as you say, it is way back
2 in '31, no effect on you today, right?
3 JUROR #10: No.
4 MR. DOYLE: All right, thank you very much.
5 THE COURT: Mr. Jay?
6 MR. JAY: Thank you, your Honor, no questions.
7 THE COURT: Mr. Boreanaz?
8 MR. BOREANAZ: No questions, your Honor.
9 THE COURT: Mr. Humann?
10 MR. HUMANN: No questions.
11 THE COURT: Mr. Naples?
12 MR. NAPLES: No questions.
13 THE COURT: Mr. Endler, your fourth challenge.
14 MR. ENDLER: Your Honor, the Government would respectfully
15 excuse Mrs. Young, Juror #6.
16 THE COURT: Mrs. Young, thank you. Your seventh and
17 eighth challenges, gentlemen.
18
19 (Defense attorneys confer off the record.)
20
21 (Edgar C. NeMoyer now present at 4:45 P.M.)
22
23 MR. HUMANN: Your Honor, we will excuse Juror #2 and
24 Juror #4.
25 CLERK: Juror #561, Herbert M. Eacker.

1 explain to him why you had acquitted someone?

2 JUROR #4: No.

3 THE COURT: Or would you tend to believe to disbelieve a
4 law enforcement witness more than if you did
5 not have this association?

6 JUROR #4: No.

7 THE COURT: All right. Now, Mr. Hacker, first of all, Mr.
8 Hacker, himself, came to me before and indicated
9 that he has a vacation commencing August 30th,
10 and I have told him, as I told Mr. Mason, that
11 I would be protective of the situation -- tell
12 them about yourself.

13 JUROR #2: I am an employee of Bethlehem Steel, my wife
14 is employed, works at Columbus Hospital.

15 THE COURT: What does she do?

16 JUROR #2: She is a nurse there. I am an office clerk
17 at Bethlehem, I have been there for three
18 years. I have never served on a jury before,
19 and I don't know anyone who is a police
20 official.

21 THE COURT: Have you been involved with any criminal
22 proceedings yourself?

23 JUROR #2: I haven't.

24 THE COURT: Your immediate family?

25 JUROR #2: Never.

1 THE COURT: Mr. Jay?

2 MR. JAY: No questions.

3 THE COURT: Mr. Boreanaz?

4 MR. BOREANAZ: No questions.

5 THE COURT: Mr. Humann?

6 MR. HUMANN: No questions, your Honor.

7 THE COURT: Mr. Naples?

8 MR. NAPLES: No questions, your Honor.

9 THE COURT: Your fifth challenge, Mr. Endler.

10 MR. ENDLER: The Government respectfully excuses Mrs. Golas.

11 Juror #4.

12 THE COURT: All right, Mrs. Golas, thank you. Your ninth and tenth challenges, gentlemen.

13

14

15 (Defense attorneys confer off the record.)

16

17 MR. NAPLES: Your Honor, the defendants excuse Mr. Hacker.

18 THE COURT: All right. You are waiving the tenth challenge?

19 MR. NAPLES: Yes, we are, your Honor.

20 MR. DOYLE: No, there is none.

21 THE COURT: The ninth and the tenth at this juncture.

22 Confer again, if you want.

23 MR. ENDLER: Your Honor, may we approach the bench for a

24 moment?

25

1 (Thereupon an off the record discussion ensued
2 at sidebar.)
3
4 (Defense attorneys confer off the record.)
5
6 MR. NAPLES: Your Honor, we will waive.
7 CLERK: Juror #314, Robert L. MacKenzie.
8 MARSHAL: Juror #2.
9 CLERK: Juror #537, Richard M. Czerniak.
10 MARSHAL: Juror #4.
11 THE COURT: Mr. MacKenzie, would you tell them about your-
12 self, please?
13 JUROR #2: Single, chemical operator at Diamond Reclama-
14 tion Company in Niagara Falls, New York. I
15 have served on civil trials in the State
16 Supreme Court, served on criminal trials in
17 Federal Court here.
18 THE COURT: How many criminal trials have you been on here?
19 JUROR #2: One that went to trial, it was a narcotics
20 trial.
21 THE COURT: All right. And have you, yourself, been
22 involved otherwise in any criminal proceedings
23 as a witness?
24 JUROR #2: I was arrested at one time for drunk driving.
25 THE COURT: How long ago was that?
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1 THE COURT: Mr. Naples?

2 MR. NAPLES: No questions.

3 THE COURT: Your sixth and seventh challenges, Mr. Endler.

4 MR. ENDLER: Your Honor, the Government would respectfully
5 excuse Mr. Fornes, Juror #10 and Mr. Bell,
6 Juror #12.

7 THE COURT: Mr. Fornes, Mr. Bell. Mr. Doyle, your last
8 challenge.

9 MR. DOYLE: May we have a moment, your Honor?

10 THE COURT: Individual challenge.

11 MR. DOYLE: I understand that.

12 (Defense attorneys confer off the record.)

13
14
15 MR. DOYLE: The jury is satisfactory to the defendant
16 Lombardo, your Honor.

17 THE COURT: Mr. Jay?

18 MR. JAY: The jury is satisfactory, your Honor.

19 THE COURT: Mr. Boreanaz?

20 MR. BOREANAZ: The same, your Honor.

21 THE COURT: Mr. Humann?

22 MR. HUMANN: The jury is satisfactory to Mr. Owczarzak.

23 THE COURT: Mr. Naples?

24 MR. NAPLES: The same, your Honor.

25 THE COURT: All right.

1 as an innocent man as he sits there?

2 JUROR #12: Yes.

3 MR. DOYLE: Mrs. Rogge, can you do the same?

4 JUROR #10: Yes.

5 MR. DOYLE: I tried that to end on a high of getting both

6 pronunciations right, and I'm going to quit

7 while I'm ahead.

8 THE COURT: Mr. Jay?

9 MR. JAY: No questions.

10 THE COURT: Mr. Boreanaz?

11 MR. BOREANAZ: No questions.

12 THE COURT: Mr. Humann?

13 MR. HUMANN: No questions.

14 THE COURT: Mr. Naples?

15 MR. NAPLES: None, your Honor.

16 THE COURT: Any challenge for either Mrs. Rogge or Mrs.

17 Ricci for cause?

18 MR. ENDLER: No, the jury is satisfactory.

19 MR. BOREANAZ: No, your Honor.

20 MR. DOYLE: The jury is satisfactory to the defendant

21 Lombardo.

22 MR. JAY: No challenge.

23 THE COURT: Let me talk with counsel a moment.

24

25 (Thereupon an off the record discussion ensued

1 at sidebar.)

2

3 THE COURT: All right. Now, the twelve of you will be
4 sworn in the morning as the main jury in the
5 case. I am going to select two alternates,
6 but everyone has agreed that the twelve of
7 you may go at this time. You may leave at
8 this time and come back at nine o'clock in
9 the morning. Mr. Laverne, would you show
10 them the room to which they will go in the
11 morning?

12

MARSHAL: Sure.

13

THE COURT: When you come back at nine o'clock go to that
14 room, and we will bring you upstairs as soon
15 as we are ready to proceed.

16

17

(The jury exited the courtroom at 5 P.M.)

18

19

THE COURT: We are going to draw two alternates. I have
20 more jurors here than I need for that purpose,
21 so we have selected at random six names. Those
22 six people will remain in the courtroom, and
23 the rest of you may leave. The first name is
24 #499, Brownie W. Wedzina. #417, Norman H.
25 Emerson. #490, Robert E. Thrun. #403, Rita D.

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4 ALT. JUROR #2: Yes.

5 THE COURT: Tell them about yourself. Speak up so that
6 all the gentlemen on the far wall can hear
7 you.

8 ALT. JUROR #2: I am single. I live at home with my parents.
9 I work with the Internal Revenue Service in
10 their taxpayer's service division. We answer
11 questions on individual tax returns and --

12 THE COURT: How long have you been with them?

13 ALT. JUROR #2: About ten months.

14 THE COURT: What did you do before that?

15 ALT. JUROR #2: I was in school.

16 THE COURT: All right.

17 ALT. JUROR #2: I was on a State Supreme Court jury last year
18 in one of the Attica trials, that was my only
19 jury service. I don't know any --

20 THE COURT: That was in Supreme Court?

21 ALT. JUROR #2: Yes.

22 THE COURT: You served on the jury?

23 ALT. JUROR #2: I was an alternate.

24 THE COURT: And which case was that, do you remember the
25 name?

1 ALT. JUROR #2: One name is Dugard --
2 THE COURT: I'm sorry?
3 ALT. JUROR #2: Dugard, one of the defendants, I don't
4 remember the other two.
5 THE COURT: You recognize, of course, that the concepts
6 in that trial would be completely different
7 from what we have here?
8 ALT. JUROR #2: Yes.
9 THE COURT: Except the Government here does bear the same
10 full burden of going forward with all of the
11 evidence convincing you, if you are a juror,
12 beyond a reasonable doubt as to each element?
13 ALT. JUROR #2: Yes.
14 THE COURT: And the defendants have no duty to go forward
15 with any evidence at all, do you understand
16 that?
17 ALT. JUROR #2: Yes.
18 THE COURT: All right. Do either of those concepts bother
19 you at all?
20 ALT. JUROR #2: No.
21 THE COURT: And do you accept without reservation the
22 presumption of innocence that these defendants
23 have the benefit of at this time and will have
24 the benefit of all the way through the trial
25 until such time as the Government has proved

1 its case beyond a reasonable doubt?

2 ALT. JUROR #2: Yes.

3 THE COURT: Does that trouble you at all?

4 ALT. JUROR #2: No.

5 THE COURT: You are employed by the Federal Government

6 in the Internal Revenue Service, and from what

7 you tell me you have no contact with investiga-

8 tive work in the Internal Revenue Service?

9 ALT. JUROR #2: None at all.

10 THE COURT: You do know auditing, field auditing, you are

11 not a revenue agent. Do you have any contact

12 at all with the special agents in the Intelli-

13 gence Division?

14 ALT. JUROR #2: Very seldom.

15 THE COURT: Now, "very seldom," what kind of contact do

16 you have?

17 ALT. JUROR #2: Well, during the filing season they are usually

18 working with us. I am in the same room with

19 them. I don't talk to them at all.

20 THE COURT: Now, nothing that you do in advising the public

21 on making out tax returns — that is what you

22 do?

23 ALT. JUROR #2: Yes.

24 THE COURT: — has anything to do with the investigation

25 or handing something over to someone for

criminal investigation or prosecution?

2 ALT. JUROR #2: If we -- very seldom something comes up that
3 is suspicious and we get in touch with
4 Intelligence, but that wouldn't come up very
5 often.

6 THE COURT: Now, the United States of America is a party
7 in this action. It is a party only because
8 it has the duty of prosecuting the charges
9 that are returned by the grand jury, but you
10 are also a federal employee, and are you going
11 to be more inclined to go along with the
12 Government in this case because of that employ-
13 ment?

14 ALT. NUMBER #2: NO.

15 THE COURT: Would you be at all embarrassed to be part
16 of a jury that returned a verdict of not
17 guilty when you have this employment?

18 ALT. JUROR #2: No, I wouldn't.

19 THE COURT: You wouldn't feel you would have to explain
20 to anybody?

21 AIE 1980B #23 NB-

22 ~~THE COURT.~~ All right. Mr. Endler?

23 MR. ENDLER: Do you know any of the people sitting down
24 here, myself or any of the defendants or
25 defendants' attorneys?

1 ALT. JUROR #2: No.

2 MR. ENDLER: Do you recognize any of the witnesses that I
3 read off?

4 ALT. JUROR #2: No.

5 MR. ENDLER: You don't know any of those people?

6 ALT. JUROR #2: No.

7 MR. ENDLER: I have no further questions.

8 THE COURT: Mr. Doyle?

9 MR. DOYLE: Mr. Fox, I am sure it comes as no shock to
10 you that my only concern, frankly, is your
11 employment with respect to the Internal
12 Revenue Service. Do you understand that --
13 were you here when we read a list of fifteen
14 FBI agents?

15 ALT. JUROR #2: Yes.

16 MR. DOYLE: You have heard obviously that there were --
17 first of all, there is a couple of federal
18 employees that are prosecuting and a couple of
19 FBI agents that are here helping them, apparently
20 there is going to be a bundle called and, of
21 course, you are in kind of a sister service,
22 the IRS, to the FBI, and the question I've
23 got to ask you is what is that going to do,
24 what kind of effect is it going to have?

25 ALT. JUROR #2: I don't think it will have any effect on me.

1 MR. DOYLE: That is obviously our concern. - The defendants
2 obviously are seated there, you are the last
3 alternate to be sworn, and low and behold you
4 are with the IRS. I am sure you understand
5 that causes some concern. If you were over
6 there in their seats, in their shoes, do you
7 feel that you could rest assured — you know
8 your mind better than anyone — that they
9 would get a fair and impartial trial at your
10 hands?

11 ALT. JUROR #2: Yes, sir.

12 MR. DOYLE: All right. The fact the Government is presenting
13 the case, and agents from the FBI were being
14 called, and law enforcement officials were
15 being called that were in federal service,
16 isn't going to cut any weight with you, am I
17 fair in saying that?

18 MR. FOX: Yes.

19 MR. DOYLE: Is it a fact that he happens to be in federal
20 service, carrying a federal badge giving him
21 a head start, as far as credibility is
22 concerned?

23 ALT. JUROR #2: No.

24 MR. DOYLE: You said you have worked at times with special
25 agents that have been in the Intelligence
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Division?

² ALT. JUROR #2: Very seldom, on occasion.

3 MR. DOYLE: Why don't I move back here and maybe our
4 voices will carry so that Mr. Noel can pick
5 them up. I wonder -- what I am getting at,
6 you tell me you are basically in the taxpayer
7 information service, is that the idea?

8 ALT. HIBOB #2: Yes.

9 MR. DOYLE: That is right at the Federal Building, the
10 new building down here on Delaware?

11 ALT. NUMBER #2: eight.

12 MR. BATES. Right on the first floor?

13 **AT WORK #2.** Upstairs, thirteenth floor.

14 MR. DOYLE: You are on the thirteenth floor. You said
15 from time to time that some circumstances
16 would come up to — incidentally, what floor
17 is the FBI on, do you know?

19 MR. DOYLE: Okay. From time to time circumstances would
20 come to your attention that would require you
21 to somehow refer it to somebody in the Intelli-
22 gence Division?

23 ALT. JUROR #2: On occasion we do have something of a suspicious
24 nature.

25 MR. DOWD: Okay. Has that happened to you personally, Mr.

1 mean that you have experienced and referred —

2 ALT. JUROR #2: A few times.

3 MR. DOYLE: When you say a few, how many times would that
4 be?

5 ALT. JUROR #2: Twice.

6 MR. DOYLE: The procedure then, do you call somebody
7 specifically in the Intelligence Division or —

8 ALT. JUROR #2: Transfer it over to the Intelligence Division
9 and write up a report.

10 MR. DOYLE: Okay. When you say something suspicious, and
11 I don't mean to dwell on this —

12 ALT. JUROR #2: Somebody that hasn't filed in several years,
13 you know. They have gotten a job, husband and
14 wife are working, they haven't filed in a few
15 years, and we just put them in touch with the
16 Intelligence Division.

17 MR. DOYLE: I take it they would call you in the first
18 instance and may relate to you that they haven't
19 filed in several years, and would you then
20 recommend that they get in touch with the
21 Intelligence Division or would you report it?

22 ALT. JUROR #2: A lot of our phone calls are monitored by
23 other taxpayer service specialists — I would
24 say at least half of the phone calls are —
25 they usually recommend that I get in touch with

Intelligence, take the taxpayer's name and phone number.

3 MR. DOYLE: Okay. What I am trying to get at, after you
4 had concluded the conversation with the
5 taxpayer, you would be the one that would be
6 contacting Intelligence and telling them what
7 had been revealed to you on the phone, is that
8 the idea?

9 ALT. JUROR #2: Right.

10 MR. DOYLE: Okay. I appreciate that you have only been
11 there ten months, but has this caused you to
12 go into court or to be, for example, in front
13 of Magistrate Maxwell or swear out any affi-
14 davits or anything of that sort?

15 ALT. JUROR #2: No.

16 MR. DOYLE: Do you anticipate that it might bring you
17 into contact with the court as a witness for
18 the Government?

19 ALT. JUROR #2: . NO.

20 MR. DOYLE: You don't envision that would even happen?

21 ALT. JUROR #2: No doubt.

22 MR. DOYLE: Have you received any training for that?

23 117-288 #2: EST

24 MR. DOYLE: You know, namely, that type of investigative
25 activity or testimony?

1 ALT. JUROR #2: No.

2 MR. DOYLE: As Mr. Lombardo sits here today does he enjoy
3 the presumption of innocence in your eyes?

4 ALT. JUROR #2: Yes, he does.

5 MR. DOYLE: You have heard me talk with a number of the
6 jurors, Mr. Fox, and I am sorry to be occupying
7 so much time as late as this, but this is
8 obviously important, you may end up on the
9 jury, and you have heard me cover with the
10 jurors time and time again that what is allegedly
11 involved here, what has been charged here is
12 a very specific federal statute that has very
13 definite elements, the Judge has given an
14 example of some five or six of them. If you
15 found that there may have been activity that
16 you did not agree with, but you were not
17 satisfied that all of the elements that the
18 Government has to prove had been proven beyond
19 a reasonable doubt, is there anything that is
20 going to stop you from returning a verdict
21 consistent with that.

22 ALT. JUROR #2: No.

23 MR. DOYLE: You don't feel that you would have to explain
24 to your employer?

25 ALT. JUROR #2: No, I wouldn't.

1 MR. DOYLE: You don't feel that you would have to explain
2 yourself to any of your coworkers or members
3 of the Intelligence Division?

4 ALT. JUROR #2: No.

5 MR. DOYLE: Any reason at all that we haven't covered in
6 the questioning that you think of as to why
7 you could not sit and be fair and impartial?

8 ALT. JUROR #2: None that I can think of now.

9 MR. DOYLE: We have pretty well covered the waterfront
10 with you?

11 ALT. JUROR #2: Yes.

12 MR. DOYLE: All right, sir. Thank you.

13 THE COURT: Mr. Jay?

14 MR. JAY: Thank you, your Honor. Mr. Fox, is there a
15 cafeteria at the Federal Building?

16 ALT. JUROR #2: Yes.

17 MR. JAY: Do you ever go in there?

18 ALT. JUROR #2: Yes, once in a while.

19 MR. JAY: And do you ever talk to any of the FBI agents
20 in the cafeteria?

21 ALT. JUROR #2: No.

22 MR. JAY: Would you know if it was an FBI agent if you
23 saw them in the cafeteria?

24 ALT. JUROR #2: We are only working part time. I usually grab
25 some coffee and out.

1 MR. JAY: I see. You are just a part time worker?

2 ALT. JUROR #2: Right now I am.

3 MR. JAY: What do you do other than that?

4 ALT. JUROR #2: I'm going to school at night.

5 MR. JAY: Okay. I think you mentioned something about

6 your calls, the calls you take are monitored?

7 ALT. JUROR #2: There are people over on the side of the room,

8 so that each one monitors different people

9 at different times.

10 MR. JAY: Listening to the phone call as you are on the

11 line?

12 ALT. JUROR #2: Right.

13 MR. JAY: Thank you.

14 THE COURT: Mr. Boreanaz?

15 MR. BOREANAZ: Do you have some career goals or objectives

16 with the Government?

17 ALT. JUROR #2: I would like to stay with the IRS.

18 MR. BOREANAZ: That is the plan that you have in mind?

19 ALT. JUROR #2: Right now.

20 MR. BOREANAZ: Is your education geared in some way to that

21 concept or that plan?

22 ALT. JUROR #2: Accounting.

23 MR. BOREANAZ: Where are you going to school?

24 ALT. JUROR #2: Canisius College.

25 MR. BOREANAZ: What level are you at?

1 ALT. JUROR #2: Master's in business.

2 MR. BOREANAZ: The concept is to complete your master's and
3 to continue that through the IRS?

4 ALT. JUROR #2: Right.

5 MR. BOREANAZ: That is all.

6 THE COURT: Mr. Humann?

7 MR. HUMANN: If this were a tax court case would you have
8 any difficulty giving the defendants the
9 presumption of innocence?

10 ALT. JUROR #2: I think I would have — I would think I would
11 be able to, yes. In that case it might be a
12 little touchy.

13 MR. HUMANN: Why?

14 ALT. JUROR #2: I've got my own ideas on taxes; and just —
15 I would think though it really wouldn't matter.

16 MR. HUMANN: You might have difficulty?

17 ALT. JUROR #2: I might have, depending on different things
18 that might come up.

19 MR. HUMANN: Would part of the reason be that the witnesses
20 on behalf of the Government would be people
21 with tax expertise?

22 ALT. JUROR #2: It might be.

23 MR. HUMANN: And they would be federal agents, right?

24 ALT. JUROR #2: Right.

25 MR. HUMANN: You realize that there will be federal agents

1 testifying in this case?

2 ALT. JUROR #2: Right.

3 MR. HUMANN: You still maintain you will have no prejudice

4 for or against these agents?

5 ALT. JUROR #2: No, I don't think so.

6 MR. HUMANN: When you say you don't think so --

7 ALT. JUROR #2: I know I wouldn't.

8 MR. HUMANN: You know you wouldn't?

9 ALT. JUROR #2: Right.

10 MR. HUMANN: When you said before you don't think so did

11 you hesitate a bit?

12 ALT. JUROR #2: I really -- I think I could be impartial.

13 MR. HUMANN: Do you have a little bit of difficulty, they

14 are federal agents, is that right?

15 ALT. JUROR #2: Not really. In a tax case it would be because

16 it is a touchy subject, the fact they were all

17 federal officers wouldn't have anything to

18 do with it.

19 THE COURT: I think, Mr. Humann, you have left the tax

20 case concept, you are talking about this type

21 of case?

22 MR. HUMANN: Yes, sir.

23 THE COURT: Placing this in that context, as not a tax

24 case, do you have any difficulty with the

25 presumption of innocence or would you have any

1 predisposition to believing an FBI agent who
2 would take the witness stand because of your
3 association or otherwise?

4 ALT. JUROR #2: No, sir.

5 THE COURT: You are saying that in all honesty and fairness,
6 as if you were a defendant charged with this
7 crime and someone else was being selected for
8 the jury?

9 ALT. JUROR #2: Yes, sir.

10 THE COURT: All right. Mr. Naples?

11 MR. NAPLES: No questions.

12 THE COURT. All right. Any challenge for Mr. Fox?

None for cause for the Government, your Honor.

14

15 (Defense attorneys confer.)

18

17 MR. DOYLE: May I respectfully request a sidecar, your
18 Honor?

1

21 (Thereupon all off the record discussion ensued
22 at sidebar.)

2

24 THE COURT: All right. Mrs. Brydalski and Mr. Fox, would
25 you go with the deputy marshal who will show

you to the room to which you will come tomorrow morning at nine o'clock. The remaining jurors are dismissed, with apologies to everybody concerned for the late hour, and we will let the others of you know when we next need to have you back.

(Thereupon the jury panel exited the courtroom
at 6:10 P.M.)

MR. DOYLE: Your Honor —

THE COURT: Now, very early in the game, before the defendants had exercised their first challenge there was a sidebar challenge of Juror #562, Miss Ruth Hacker, who then occupied seat Number 2 in the jury box, for cause, which I denied. I suppose that, in view of the later history of challenges, that is not pressed. It is noted on the record.

MR. DOYLE: Fine. I merely wish to have it noted that I did challenge.

THE COURT: At a subsequent sidebar conference there was a challenge for cause of Alternate Number 2, Michael Fox, which I also have denied. I assume that you want to take exception to that?

1 MR. DOWLE: Yes, respectfully, I want to. In light of
2 the fact that my challenge for cause to
3 Michael Fox was denied, I would respectfully
4 request that the Court allow me an additional
5 peremptory challenge, and point out that there
6 is some degree of substantial certainty that
7 the alternates, one at least, possibly more,
8 will see service by virtue of the commitments
9 with respect to the vacations that have been
10 given to -- at least as I understand it --
11 one of the sitting jurors now. I feel almost
12 certain from my understanding of the time
13 schedule that Alternate #1 will almost
14 certainly be used, and in light of that I
15 am asking for an additional peremptory
16 challenge to be exercised jointly by the
17 defendants for the second alternate.

18 THE COURT: Well, whatever I might have done earlier in
19 that regard, I won't do now, in view of the
20 fact that all the jurors have been dismissed.
21 I have had no earlier such request and, of
22 course, the rule is clear as to the basic
23 number of challenges allowed as to a certain
24 number of alternate jurors, and I do deem
25 two to be sufficient, as I indicated before and,

1 again, if there had been any inclination on
2 the part of the defendants not to be content
3 with that number of alternates, that could have
4 been raised earlier. As I recall, the only
5 one of the parties or attorneys who said any-
6 thing about any additional number was Mr.
7 Endler in the conference in chambers, who
8 mentioned sort of questioningly whether or
9 not I was going to have four alternates. I
10 told him and everybody at that time that I
11 was going to have two. Is there anything
12 further you want to put on the record?

13
14 (No response.)

15
16 THE COURT: Now, obviously, we are not going to do any-
17 thing today on the audibility hearing, and
18 I assume that your expert, Mr. Endler, has
19 been working along the route that we outlined
20 and set for him in our conference this morning,
21 where he is going through the full transcripts
22 that you have and is marking or otherwise
23 indicating in there what part of that he is
24 going to be relying upon in his summary or
25 expert testimony when and if allowed and,

EXCERPTS FROM THE TRIAL TESTIMONY

1 THE COURT: Mr. Jay, you have to do whatever you think
2 proper in the circumstances for your client.
3 My own opinion is that if the jury at this
4 point were to decide that there was some inter-
5 relationship of Mr. DiCarlo with Mr. Lombardo
6 that there would be sufficient grounds for it.
7 You have to take it from there. Let's take
8 five minutes.

9
10 (Thereupon the court was in recess at 2:50 P.M.)

11
12 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3 P.M.
13

14 (Defendants present, counsel present, jury
15 present.)

16
17 S U S A N H E L' E N E J E N K I N S, called as a witness
18 on behalf of the Government, and having been previously duly
19 sworn, resumed and testified further as follows:

20
21 THE COURT: I want to note for the record, what we lawyers
22 call nunc pro tunc, when the jury did come in
23 to the courtroom at I believe about one forty
24 today, as anticipated, Juror Number 7, Michael
25 Mason, was not present, and according to my

earlier indication, Alternate Number 1, Mrs. Brydalski, has become since that time Juror Number 7. Michael Fox, formerly Alternate Number 2, is not Alternate Number 1. During the direct examination of Mrs. Jenkins, she made reference to a third individual, other than Mr. DiCarlo and Mr. Owczarzak, whom she had observed at her apartment at Windham Court, an individual whom she said it was made known to her as being a Joseph Lombardo, whom she at one point on one of the two occasions said that this individual indicated to her that he lived in the Hickory Hills Apartments, and of course, she was not able to identify the defendant Joseph Lombardo, and she was not able to identify the man she had known at the apartment as Joseph Lombardo as being anyone here in the courtroom. On the basis of that, it is my decision that this evidence must go out of the case, as far as it relates to any person named Joseph Lombardo, with or without the Hickory Hill Apartment reference, as being in this apartment on either, as she said, November 5th or approximately a week later, November 12th, and you are to ignore it as if Mrs. Jenkins had

1 WILLIAM L. HOLMES, called as a witness on
2 behalf of the Government, and having been previously duly
3 sworn, resumed and testified further as follows:

4

5 DIRECT EXAMINATION BY MR. ENDLER (Cont'd.):

6 Q. Mr. Holmes, yesterday before we broke for the evening recess
7 I was discussing -- we were discussing various wagers that
8 you had occasion to see in the transcripts and tapes, do
9 you remember that, sir?

10 A. Yes.

11 Q. I believe we had gone through various wagers, and you had
12 told us what dollar amount, if any, you would attach to
13 that?

14 A. That is correct.

15 Q. And after you had done that, did you have occasion to go
16 through the transcripts and the tapes with respect to
17 determining the gross amount per day, if any, that had been
18 wagered?

19 A. Yes, I did.

20 Q. Were you able to make a calculation as to that gross
21 amount, sir?

22 A. Yes, I did.

23 Q. Those calculations, sir, were they determined -- in other
24 words, the final figure that you arrived at for the day,
25 was that based on the figures or the wagers you had told

1 us about yesterday?

2 A. Yes, they were.

3 Q. Sir, did you make a record of these calculations per day?

4 A. Yes, I did, I made notes.

5 Q. Without referring to your notes, are you able to tell us
6 as to each and every day the exact amount of your calcu-
7 lations?

8 A. No, sir, I am not.

9 Q. And do you have those notes in front of you, sir?

10 A. Yes, I do.

11 Q. Do they reflect your calculations on the gross amount of
12 money wagered?

13 A. Yes, they do.

14 Q. This is reflected, at least in your opinion, from the tapes
15 and the transcripts?

16 A. That is correct.

17 Q. Sir, did you have occasion to make any calculations as
18 to November 1, 1975, the gross amount, that is?

19 A. Yes, I did.

20 Q. Sir, could you tell us what your opinion reflected as to
21 the gross amount of wagers reflected in, once again, the
22 tapes and transcripts for November 1st?

23 A. The total amount of money wagered on November 1, 1975
24 was \$48,127.

25 Q. Did you have occasion, once again, to make any calculations

1 as to November 2, 1975?

2 A. Yes, I did.

3 Q. What, in your opinion, were those calculations?

4 A. \$16,965 for November 2, 1975.

5 Q. Sir --

6 MR. DOYLE: What exhibit is he reading from?

7 THE COURT: These are notes.

8 BY MR. ENDLER:

9 Q. Did you have occasion to make any calculations --

10 MR. DOYLE: Are they marked?

11 THE COURT: They are not, but I am sure they will be, they
12 can be now.

13
14 (Thereupon notes referred to were marked
15 Government's Exhibit 226 for identification.)

16
17 BY MR. ENDLER:

18 Q. I am returning to you this folder containing papers which
19 has been marked Government's Exhibit 226. For the record,
20 that is the exhibit that you are reading from, your notes?

21 A. Yes, it is.

22 Q. I believe, sir, I was referring to -- had you had occasion
23 to make calculations with respect to November 3, 1975?

24 A. Yes, I did.

25 Q. What, in your opinion, was the figure, the gross figure

1 you arrived at?

2 A. For November 3, 1975, it was \$8,020.

3 Q. Did you have occasion to make calculations with respect
4 to November 7, 1975?

5 A. Yes, sir, I did.

6 Q. Once again, could you give us your opinion as to the gross
7 amount of wagers?

8 A. For November 7, 1975, \$9,870.

9 Q. Sir, did you have occasion to make some calculations as
10 to November 8, 1975?

11 A. Yes, sir. For November 8, 1975, \$30,935.

12 Q. Did you make a calculation as to November 9, 1975?

13 A. Yes, sir. For November 9, 1975, \$41,235.

14 Q. Sir, did you have occasion for November 10, 1975?

15 A. Yes, sir. For November 10, 1975, \$12,515.

16 Q. And sir, as to November 14, 1975, did you make a calcula-
17 tion?

18 A. November 14, 1975, \$8,040.

19 Q. As to November 15, 1975, sir?

20 A. November 15, 1975, \$25,955.

21 Q. And as to November 16, 1975, sir?

22 A. November 16, 1975, \$29,760.

23 Q. As to November 17, 1975, sir?

24 A. November 17, 1975, \$7,985.

25 Q. Sir, did you also have occasion to make calculations with

1 respect to the tapes and transcripts during the month of
2 December 1975?

3 A. Yes, sir, I did.

4 Q. With respect to December 1, 1975, could you tell us what
5 your calculations show?

6 A. December 1, 1975, \$10,765.

7 Q. With respect to December 2, 1975, sir?

8 A. December 2, 1975, \$2,885.

9 Q. With respect to December 3rd?

10 A. December 3, 1975, \$7,000.

11 Q. And December 4, 1975?

12 A. December 4, 1975, \$4,505.

13 Q. December 5, 1975, sir?

14 A. December 5, 1975, \$15,810.

15 Q. And December 6, 1975?

16 A. December 6, 1975, \$10,645.

17 Q. And December 7, 1975, sir?

18 A. December 7, 1975, \$33,655.

19 Q. And December 8th, sir?

20 A. December 8, 1975, \$8,875.

21 Q. December 9, 1975, sir?

22 A. December 9, 1975, \$7,005.

23 Q. December 10, 1975, sir?

24 A. December 10, 1975, \$6,985.

25 Q. December 11, 1975, sir?

1 A. December 11, 1975, \$13,125.

2 Q. Now, sir, I believe yesterday you had explained to us a
3 definition or a meaning of vig or vigorish?

4 A. Yes.

5 Q. In determining your calculations, which we have gone through
6 as to various amounts wagered per day, could you tell us
7 how, if at all, you figured or did not figure this so-called
8 vigorish into these amounts which we have just run through?

9 A. Well, our rule is that we do not include any vigorish when
10 we figure up a total handle or total amount of money
11 wagered, and also if, for instance, in what we call a
12 teaser, a one team teaser wager, it is a two for one,
13 meaning that the bettor would have to put up \$200 to win
14 \$100, and since the bettor is risking \$200, that could be
15 construed as the amount of wager, but we did not include
16 that, we took the \$100 figure, and that is the way we
17 based our calculation.

18 Q. You said in the teaser the bettor or the wagerer has to
19 wager really two for one?

20 A. There's three different types of teasers; a six point
21 teaser, a ten point teaser, and a fourteen point teaser.
22 It is also a one team or two team or three team teaser.
23 Now, taking a six point teaser, which was primarily what
24 was involved in this case, this is the method to give the
25 bettor a little more -- more points, so that he had a little

1 PROCEEDINGS IN CHAMBERS AT 1:05 P.M.
2
3

4 PRESENT: Mr. Gardner, Juror #1, and Mr. Fox, Alternate
5
6 Juror #1.
7
8

9 THE COURT: I wanted to talk with the two of you and find
10 out what your situations are on the record
11 without the attorneys being present. For the
12 record, we have Mr. Gardner, Juror #1, and
13 Mr. Fox, who is Alternate #1. I have known
14 that Mr. Gardner had a continuing problem,
15 which he has been good enough to live with,
16 special chores attending his reorganizing the
17 school bussing for some school district in
18 Lancaster, and I know the school season is
19 fast upon us. I get some word that you have
20 a special problem on Tuesday?
21
22

23 MR. GARDNER: Yes, sir. Tuesday is the day before we start
24 back, and I always have the driver's report
25 the day before for an orientation program.
I would like very much to be able to be there
Tuesday. When they return that day they have
a chance to view their new routes and go over
changes that we have had take place during the
summer.

1 THE COURT: School starts Wednesday?

2 MR. GARDNER: That is right.

3 THE COURT: And what time is your meeting set for?

4 MR. GARDNER: Nine o'clock Tuesday morning.

5 THE COURT: How long would it last?

6 MR. GARDNER: Oh, probably until beyond eleven thirty or

7 so.

8 THE COURT: That long a meeting?

9 MR. GARDNER: Yes, sir. What they will do, after the meeting

10 is over they take their runs, take the vehicles

11 out, familiarize themselves with the run.

12 THE COURT: After eleven thirty.

13 MR. GARDNER: Yes, sir, after eleven. Usually that is what

14 we try to hold to, eleven, but generally it

15 will be beyond there. I have authorization

16 to pay them for two hours, for the most part

17 it goes over that.

18 THE COURT: From what you told me before, you said you

19 had quite a number of different routes, I

20 can't remember the numbers you told me now.

21 MR. GARDNER: It is forty-four.

22 THE COURT: You have that number of drivers?

23 MR. GARDNER: Forty-four in the regular group, plus the

24 spares, I have a total of fifty-seven drivers.

25 THE COURT: Who would be attending this indoctrination

1 meeting. What is involved in the meeting,
2 other than the change of routes that you have
3 installed?

4 MR. GARDNER: Well, we changed the bus passes, the school
5 passes, considerable change, the method of
6 picking up the Earl Harkness students. Nor-
7 mally they were picked up with high school
8 students on one pickup throughout the area.
9 Now I have a different system, four busses
10 sweeping the entire school district, picking
11 up the Earl Harkness students. Special passes
12 involved this year, I changed the whole pass
13 setup. Rather than issuing passes to the
14 entire student population that are entitled
15 to ride, I have just changed it this year
16 to issue passes to the people on the border
17 line streets at the mile and a half marker.
18 New forms, new daily trip sheets, accident
19 breakdown procedure, and five or six items
20 that I expect to go over with them, plus
21 their problems. I had a new job that was up
22 for bid that I didn't get a chance to inter-
23 view anybody for to fill the job, and I have
24 various problems I can't think of right now.
25

THE COURT: All right. Mr. Fox, the indication is that

1 you have a problem Tuesday?

2 MR. FOX: Well, I am working part time for the IRS. We've
3 got a training class starting Tuesday, it goes
4 for about three weeks.

5 THE COURT: A three week training course?

6 MR. FOX: About, a little less than three. There is a
7 full time job opening up, and they take the
8 people that -- there has been other training
9 courses -- the ones that have had three training
10 courses, they will fill that position, then
11 they would go to the ones that had two training
12 courses. I only had one training course, and
13 if I don't take this one I will go down to the
14 bottom of the list, and likely I will never
15 get a full time job.

16 THE COURT: What is the essential nature of being there
17 on the first day?

18 MR. FOX: The first day, well, there's two classes the
19 first one, and I am scheduled to be in Tuesday.
20 I went down to the IRS during lunch and they
21 said they would allow me to start Wednesday
22 at noon, if I could -- if I was done I could
23 start Wednesday at noon in the second class or
24 probably Thursday, I could skip Tuesday and
25 Wednesday, if I could get in there Thursday

1 that would probably be all right. The first
2 day is usually handing out the material.

3 THE COURT: All right. That gives me a grasp of the
4 situation than. I will see what we are going
5 to do on it. You can walk right out here and
6 go out to the hall and go down the stairway
7 or the elevator. I will be calling you up-
8 stairs soon.

9
10 * * * * *

11
12 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 1:15 P.M.

13
14 (Defendants present, counsel present, jury
15 absent.)

16
17 THE COURT: As I got back from lunch, gentlemen, I was
18 apprised of a juror problem which I did not
19 know the magnitude of, and it involves Mr.
20 Gardner, who is Juror #1, and I had known
21 pretty much from the outset because he had
22 come to me at the time we had the jurors come
23 in and indicated that he had a position of
24 responsibility in Lancaster concerning school
25 bussing, and he was in the process of revamping

1 THE COURT: This housecleaning, I don't mean to demean
2 it. It is not easy, ladies and gentlemen,
3 when we are dealing with this length of a trial
4 and this number of exhibits, and the indecisive-
5 ness of the jurist as to whether or not documents
6 should be in or out, we sometimes lose track
7 of whether certain things are in or out, and
8 all the attorneys and myself go over that so
9 Mr. Endler knows what I have actually recorded
10 as being received in evidence, and if he has
11 some disagreement, then we get it straightened
12 out, so that everything that he wants to come
13 in and legitimately should come in as part of
14 this case will be in and part of the record
15 before he officially closes his case. So that
16 need not concern you, the jury. Obviously, I
17 will announce to you the result of that, by
18 saying to you in your presence and on the
19 record what exhibits have been admitted, so
20 you will know that. You know, ladies and
21 gentlemen from my comments that I have been
22 hopeful that we might have had the case dis-
23 posed of by a week ago today, and it has been
24 no one's fault. Everyone has been doing his
25 job and trying to get things in and trying to

1 keep things out and cross examining and going
2 into details, which are necessary to the case,
3 and each lawyer is doing his best possible job that
4 he can for his respective client. As a result,
5 we have come to this point where a week later we
6 have ended the Government's case. I have been
7 assured by attorneys for the defendants that
8 while most of them have some evidence, I think
9 maybe each has some evidence at this point, -
10 they are not bound by what is said, of course,
11 but each at this point gives me some indication
12 that there will be a brief amount of evidence
13 put in on behalf of each, the totality of
14 which should not be more than a half day, but
15 then again you never know. Now, I have not
16 polled the jury to find out what the individual
17 jurors availability and situations are, except
18 the attorneys know this, of course, I have
19 become aware of certain problems that Mr.
20 Gardner has, Juror #1, on the morning of
21 Tuesday the 7th, and have become aware of
22 certain problems that Alternate #1, Mr. Fox,
23 has on that day and the following day, but
24 these do not, he tells me, become insurmountable
25 until he reaches the fourth day of next week.

1 and it should be that we would complete the
2 evidence on that morning, and then in the
3 afternoon proceed to the summations of counsel
4 and to my instructions, which unfortunately
5 all of this I know is going to take us to
6 probably somewhere in the area of five thirty
7 to six thirty at night on Tuesday, and at
8 that time the case could be handed to you and
9 subject to your own decision on it, you would
10 then be holding as a group, with someone
11 selected to speak for you, subject to your
12 own decision, and it would be my suggestion
13 that you with or without going to dinner that
14 evening get into some preliminary deliberations
15 on the case. That is my own thinking, but,
16 again, you are the ones that are going to
17 decide both the case and your determination.
18 My only expectancy is that this case cannot be
19 fully determined and resolved by you in one
20 evening's sitting starting that late, so that
21 at some appropriate time, again subject to
22 what you tell me, we would disband for the
23 evening and come back on the next morning, and
24 Wednesday, this would be the 8th, when you
25 would continue your deliberations and hopefully

1 on that day then come to your verdict. That
2 is the full exposition, that is where we stand,
3 that is all we can do about that. Now, we have
4 a long weekend, we won't be back until Tuesday
5 morning, so again it is much more important,
6 even though you have heard all the Government's
7 case at this point, and you are perhaps in a
8 position to come to some decision on the basis
9 of what the Government has put in, nevertheless,
10 you have not heard what the defense will put
11 in by way of evidence, you have not heard the
12 arguments of counsel, you have not heard my
13 instructions. So keep your minds open on all
14 of the issues in the case, do not discuss it
15 among yourselves, and most importantly, do
16 not talk about it with anyone else. I will
17 see you Tuesday morning.

18
19 (Thereupon the jury exited the courtroom at
20 5:05 P.M.)
21

22 MR. JAY: Your Honor, I think you indicated earlier that
23 you might be in a position to rule on our
24 requests to charge. Since we are going to be
25 summing up on Tuesday, I would like to have the